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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 986

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

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No. ———

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the final judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on June 13, 1967.

CITATIONS TO OPINIONS BELOW

The order of the Supreme Court of Florida, dated October 11, 1967, denying petition for certiorari is not yet officially reported, appears in the Record at page 451, and is printed in Appendix A hereto, *infra.*

The opinion of the District Court of Appeal, Third District of Florida, dated May 9, 1967, is officially reported at 199 So. 2d 122, appears in the Record at page 438, and is printed as Appendix B hereto, *infra.*

The Corrective Final Decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida, dated April 19, 1967, is unreported, appears in the Record at pages 412-420 and is printed in Appendix C hereto, *infra.*

The Supplemental Final Decree of the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida dated September 9, 1963, in the case of *Margaret Morton vs. Richard Morton* is unreported, appears in the Record at pages 21-24 and is printed in Appendix D hereto, *infra.*

JURISDICTION

The judgment of the District Court of Appeal, Third District of Florida was entered on June 13, 1967. A timely petition for certiorari was filed in the Florida Supreme Court on August 8, 1967 which was denied by the Supreme Court of Florida by Order dated October 11, 1967, R. 451, Appendix A hereto, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) since a right, privilege and immunity was claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitu-

tion, the real property interests of a non-resident spouse may be levied upon by a state court to satisfy an alimony award where (1) the spouse has never appeared or been personally served with process in the alimony proceedings, (2) no seizure or attachment of the property occurred until more than one year subsequent to the entry of the alimony award, and (3) notice that the real property might be proceeded against was contained in a constitutionally inadequate constructive notice of the alimony claim?

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In April 1962, respondent, Margaret Morton, instituted suit in the Circuit Court for Sarasota County, Florida against her non-resident husband, Richard Morton, for alimony unconnected with divorce. No personal service of process was obtained upon the husband and he made no appearance in the action. In August of that year she

amended her complaint to seek in the alternative, alimony unconnected with divorce or, divorce and alimony.[1] Commencing on September 20, 1962, process was published in a Sarasota newspaper once a week for four weeks. The published process (R. 75) a copy of which, together with the Second Amended Complaint was mailed to the nonresident husband in Jackson, Mississippi, contained the advice that: "Plaintiff is proceeding against the following described real property * * *".
Thereafter followed a legal description of the property here involved, which is a complex of apartment buildings located more than 150 miles from Sarasota, Florida on Miami Beach, Dade County, Florida and which will be referred to as Morton Towers.[2]

The Second Amended Complaint sought the appointment of a receiver to take possession of the husband's assets in Florida, and sought orders of sequestration and garnishment of his property. No such orders were ever obtained. No personal service of process was ever obtained upon the husband, Richard Morton, and he made no appearance in the litigation.

On October 4, 1962, Lawrence Morton, Richard Morton's father, pursuant to a power of attorney which had

[1]The Sarasota divorce court Record appears in the original record filed herewith as Defendant's Exhibit #2, and has not been paginated by the clerk below. Pertinent portions of this Record have therefore been reproduced in Appendices D, E and F hereto for the convenience of the Court.

[2]Respondent claimed no pre-existing ownership, equitable or legal, in the property in question, but sought to have her husband's interest in the Morton Towers property subjected to her claimed right to alimony and child support. She did, however, claim a pre-existing ownership in certain other property, described in her amended complaint and in her published process, which property, consisting of a private residence, is not here involved.

been granted to him by his sons and their spouses, including Richard Morton and respondent, Margaret Morton, conveyed to petitioner, Wheatland Hills Corp., the undivided eight per cent interests in the Morton Towers property of each of his three sons.[3] The capital stock of petitioner was then issued to Richard Morton and his two brothers.

On September 4, 1963 the Sarasota Circuit Court granted to respondent an *ex parte* divorce (R. 19) from her husband and on September 9, 1963 awarded her lump sum alimony and child support in the sum of $450,000.00 payable in ten equal annual installments. (R. 21; Appendix D hereto, *infra*) Attorneys' fees, costs and temporary alimony were awarded to her in the sum of approximately $100,000.00. These sums were made a "special equitable lien" (R. 22) upon the husband's interest in the Morton Towers property and upon ". . . all other real and personal property of the Defendant of whatsoever nature located within the State of Florida." (R. 22) These orders make clear that they were not based upon personal jurisdiction over the defendant, although the decree of September 9, 1963, which awards alimony to the wife, is in the form of a personal judgment. On August 25, 1964, (Appendix E hereto) and October 5, 1964, (Appendix F hereto) more than one year *after* the alimony judgment the Sarasota court, for the first time, entered orders purporting to take the Morton Towers property into *custodia legis*.

In summary, the Sarasota court never exercised per-

[3]A complete history of the financial and ownership arrangements regarding the Morton Towers property is contained in the Stipulated Facts. (R 193-197).

sonal jurisdiction over the defendant-husband. It did not purport to seize his property or to take the property into the custody of the court until long *after* the alimony judgment was entered.

With the Sarasota alimony judgment, respondent attempted to levy on the Morton Towers property. Petitioner brought this suit in the Circuit Court for Dade County, Florida to enjoin the levy on the grounds, *inter alia*, that the Sarasota Court had acquired no jurisdiction over the person of Richard Morton or over the Morton Towers property, and that the judgment for alimony was constitutionally void for lack of jurisdiction. Respondent asserted that the Sarasota Court had jurisdiction to enter the alimony decree and that the conveyance of the property to petitioner was of no consequence unless petitioner was a bona fide purchaser without notice of the Sarasota proceedings. The Dade County court in its final decree[4] held:

> "An absconding father and husband, who avoids personal service by fleeing the jurisdiction of the courts of this State, leaving behind real property within the jurisdiction of this State, may thus escape personal liability for the payment of support and alimony to the deserted wife and children. Not so the property within the State; it remains subject to the processes of our courts and may be seized and sold to provide support for the abandoned wife and children.

[4]The emotionally charged language in this decree, *e.g.* "absconding," "fleeing," "mockery," etc. are unsupported by the record and are, in fact, not true but indicate the difficulties in obtaining due process for a non-resident husband. In this case, however, such language may be attributable to the fact that the court adopted as its decree the language prepared and submitted by the wife's counsel, including the colorful, but inaccurate descriptions of the husband.

"The fleeing husband does not escape with his real property by the simple device of forming a corporation, after leaving the State, to which he conveys the title in exchange for the capital stock of the corporation. The courts of this State and their processes are not impotent in the face of this mockery. It is obvious that the courts of this State have the power to appropriate the absent husband's property to the payment of his obligation for the support of his wife and children, provided proper procedures are adopted to accomplish this end.

"In *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565, it is pointed out by the Supreme Court of the United States, in speaking of the power of state courts, that "it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens", and this may be accomplished by substituted service by publication 'where the property is once brought under the control of the court by seizure or some equivalent act' ".

"Service by publication was accomplished in this cause and notice of the proceedings was received by Richard and the order requiring him to appear *specifically described the property against which Margaret was proceeding in said divorce suit*, giving to Richard full notice that it was the purpose of the suit to appropriate this property to the satisfaction and payment of the claims due her and her children for support.

"In *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090, the court said that the 'seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice, which *warns the defendant that one of the purposes of the proceeding is the sequestration of the land*'. This principle is cited with approval by the District Court of Appeal of Florida, Third District, in the case of *Webb v. Webb*, (1963) 156 So. 2d 698, 701.

"Again, in *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684, it was pointed out that the husband was a non-resident over whom the court did not obtain jurisdiction. However, the court held that since the complaint and the published notice to the defendant husband contained a particular description of the land sought to be appropriated, such notice was equal to a sequestration of the land.

"The amount awarded to Margaret, and the creation of a lien upon the property for the payment of the award, are matters which are finally concluded in the proceedings in the Twelfth Judicial Circuit. This Court is bound by those adjudications." (Emphasis supplied).

The Dade County Circuit Court ordered the undivided eight per cent interest in Morton Towers acquired by petitioner from Richard Morton sold at public auction to

satisfy the Sarasota Court's awards for alimony, child support and attorneys' fees.

Petitioner appealed to the District Court of Appeal of Florida, Third District which affirmed the Dade County Circuit Court, holding:

> "The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be subjected to the satisfaction of the claim for alimony and child support." (Opinion dated May 9, 1967. (R. 438)

Petitioner then applied to the Supreme Court of Florida for a writ of certiorari to review the decision of the District Court of Appeal. This petition was denied without opinion. (R. 451; Appendix A hereto *infra.*).

RAISING THE FEDERAL QUESTION

Petitioner in its complaint in the Circuit Court for Dade County, Florida asserted that the Sarasota judgment was void for failure to comply with the due process requirements of the XIV Amendment, United States Constitution (R. 8, 9). The Dade County Circuit Court clearly considered the federal constitutional question in its final decree. (R. 416).

Petitioner appealed to the District Court of Appeal of Florida, Third District, preserving the federal question in the following manner:

"POINT II

SEIZURE OF THE RES IS REQUIRED BY FLORIDA STATUTES AND THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT IN QUASI IN REM ACTIONS OF THE TYPE HERE INVOLVED." (Petitioners Brief in Florida District Court of Appeal, Third District, p. 11, 15)."

After the District Court of Appeal affirmed the trial court, petitioner applied to the Supreme Court of Florida to review the decision of the District Court of Appeal. Petitioner asserted the federal question in its petition to that court.[5] Although the federal question did not, under Florida procedure, constitute an independent basis for review by the Florida Supreme Court, the petitioner did exhaust all possibilities for review of the decision within the Florida system. cf. *Nash v. Florida Industrial Commission*, fn. 1, No. 48, Oct. Term 1967 (decided Dec. 5, 1967).

REASONS FOR GRANTING THE WRIT

This case involves an important and substantial issue regarding one of the most basic elements of Due Process of Law, a court's jurisdiction to enter a valid judgment affecting the property of a non-resident defendant who has neither appeared nor has been personally served with process.

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[5]"The decision of the court below is, in addition, in violation of the due process clause, Amendment XIV, United States Constitution, Pennoyer v. Neff, 95 U.S. 714 (1873); Pennington v. Fourth National Bank, 243 U.S. 269 (1917) and Section 1, Declaration of Rights, Florida Constitution." (Page 8, Petition to Florida Supreme Court).

The issue here raised concerns due process requirements which this Court *has* previously considered and *has* established pursuant to the Fourteenth Amendment of the United States Constitution. Petitioner submits, however, that these principles have *not* been followed by most State courts and lower federal courts when ruling upon the precise question here involved, and that the present case marks the addition of the State of Florida to those jurisdictions that steadfastly and consistently refuse to adhere to the constitutional principles enunciated by this Court. The grant of certiorari is therefore both appropriate and essential to halt this flouting of long-established due process requirements.

The question presented by this petition is one of the most common, garden variety species that daily arises in that rapidly expanding class of litigation — divorce and alimony. That question is to be found in the context of what this Court has described as a divisible and *ex parte* divorce, the defendant spouse being a non-resident of the forum state and not having made an appearance in the case or been personally served with process. In that situation the forum court does obtain jurisdiction, through constructive service upon the absent spouse, to sever the marital status and to render a valid judgment of divorce. But this Court has made clear that such constructive service on the non-resident spouse does not suffice, constitutionally speaking, to confer jurisdiction on the forum court to render a personal judgment compelling that spouse to pay alimony. "The result in this situation is to make the divorce divisible — to give effect to the . . . [forum] decree insofar as it affects marital status and to make it ineffective on the issue of alimony." *Estin* v. *Estin*, 334

U.S. 541, 549 (1948). See also *Williams* v. *North Carolina*, 317 U.S. 287 (1942); *Id.*, 325 U.S. 226 (1945); *Armstrong* v. *Armstrong*, 350 U.S. 568 (1956); *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). A valid alimony decree, in short, must be predicated upon an *in personam* jurisdiction acquired through personal service or voluntary appearance.

In this instance, therefore, Florida did not acquire jurisdiction over the non-resident husband, Richard Morton, for purposes of awarding alimony to the wife, the service on the husband having been purely constructive in nature. And it would follow that the effort to ground jurisdiction over the absent husband's property in Florida *solely* on the basis of the reference to and description of that property in the constitutionally inadequate notice of the alimony claim can give Florida no greater jurisdiction over the property than it had over the alimony claim.

True enough, Florida could have had jurisdiction — had such jurisdiction been invoked — to deal with the property within its borders regardless of the residence or presence of the owner. And such jurisdiction could have been invoked as an adjunct to an alimony claim not otherwise enforcible under the "divisible divorce" decisions of this Court. But to invoke that jurisdiction over the property, even to the extent of the alimony claim, requires compliance with certain constitutional requirements established by this Court, requirements which the Florida courts and a host of other courts have repeatedly ignored.

The basic constitutional requirements in this type of situation were set forth in *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917), involving an effort by an

Ohio court to enforce an obligation of an absent husband to pay alimony by attaching the husband's bank account in Ohio. Speaking for the Court, Mr. Justice Brandeis wrote (243 U.S. at 272):

> "The only essentials to the exercise of the state's power are presence of the res within its borders, *its seizure at the commencement of proceedings*, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, — that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized." [Emphasis added.]

These constitutional "essentials" have never been altered or lifted by this Court, the *Pennington* rule having been cited with approval in *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 at 419, n. 6 (1957); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 at 443, n. 19 (1951); and *Propper* v. *Clark*, 337 U. S. 472 at 488 (1949).

It is the second of the *Pennington* "essentials," the "* * * *seizure* at the commencement of proceedings * * *," which was not complied with in the present case. Indeed, the property here involved was never seized prior to the divorce judgment or the alimony award; the property was not even purportedly seized by the divorce court until more than a year after the divorce and alimony judgment.[6]

[6]The Sarasota Court first entered orders purporting to seize and bring the Dade County realty into the custody and control of the court over a year *after* the alimony judgment was entered. "It is the purpose

The requirement of seizure of property specified in *Pennington* as a Due Process essential, stems, of course, from *Pennoyer v. Neff*, 95 U.S. 714 (1878):

> "Substituted services by publication or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken *where property is once brought under the control of the court by seizure or some equivalent act.* The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that *its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.* Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or when the public is a party, to condemn and appropriate it for public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose." 95 U.S. at 727 (Emphasis supplied).

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of this order * * * to take into custodia legis the above-described res * * *." Temporary Restraining Order dated August 25, 1964. Appendix F hereto, *infra*. Order dated October 5, 1964, Appendix F hereto, *infra*.

The type of proceeding here involved, in which a purely personal claim for alimony is asserted against the defendant, to be satisfied from the defendant's property, is termed quasi in rem[7] and *seizure* of the property has been held by this Court in *Pennoyer* and *Pennington* to be an essential requirement of due process of law, in such proceedings.

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[7]There are two types of proceedings which are called quasi in rem. These are set forth in the Restatement of Judgments, § 32, Comment a, as follows:

> "Proceedings quasi in rem are of two types. In the first type the plaintiff *asserts an interest in property* and seeks to have his interest established as against the claim of a designated person or designated persons. In this type are included actions to recover possession of land or to establish the title to land, such as an action of ejectment, or one to quiet title or to remove a cloud on title, where the court has jurisdiction to give the relief asked because of its power over the land, even though it has no power over the adverse claimant. Of the same type is an action to foreclose a mortgage. If the court has jurisdiction over the person of the defendant as well as over the property, a judgment may be rendered which binds the defendant personally as well as his interest in the property. (See § 3, Comments b and c)."
>
> "In the second type of proceeding quasi in rem the plaintiff does not assert that he has an interest in the property, but *asserts a claim against the defendant personally*, and seeks to compel to the satisfaction of his claim the application of property of the defendant, by attachment or garnishment." (Emphasis supplied)

In the first type of quasi in rem jurisdiction, the plaintiff claims a pre-existing interest in the property and by filing his complaint tenders the property to the court for the exercise of its jurisdiction. Service by publication on the defendant is sufficient without any act of seizure on the part of the court itself. The claim sought to be litigated involves the title to the property and pertains exclusively to the property itself. The second type of quasi in rem jurisdiction is the type in which the debt sought to be enforced is unrelated to the property sought to be brought into custodia legis as the foundation for a money judgment. In this type of action the court must take some affirmative action to take control of the property. *Pennoyer v. Neff, supra.*

In the years since *Pennoyer* and *Pennington* however, the due process requirement of *seizure* of property where a claim for alimony is made has been honored in the breach rather than in the observance by state courts, when dealing with the question of alimony, resulting in a conflicting and chaotic body of law among the states upon these *federal* constitutional principles.[8]

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[8]A recent Annotation upon the precise issue raised herein appears in the American Law Reports, 3rd, 10 ALR 3d 212 (1966). The editor there states:

> "The Supreme Court's language in the Pennoyer Case as to bringing the property within the court's control by attachment or an equivalent act 'in the first instance'; and its statement in the Pennington Case that one essential of due process is 'seizure at the commencement of the proceedings' have not been literally followed by any court. The state courts and lower federal courts have held that due process is satisfied in in rem actions by seizure before the entry of final judgment, by a specific description of the property proceeded against, and even without prejudgment seizure or specific description." 10 ALR 3d at 215.

This Annotation does not distinguish between those cases where the resident spouse claims a pre-existing interest in the property and seeks its division, and those cases where the resident spouse, as here, claims no pre-existing interest in the property, but merely seeks to have it applied to the personal claim for alimony.

The following cases are all cases of the latter type, i.e. no pre-existing interest in the property is claimed:

(a) Cases in which a legal seizure not at the commencement of proceedings but prior to final decree, has been held sufficient to satisfy due process:

Connecticut: *Pezas v. Pezas*, 151 Conn. 611, 201 A.2d 192 (1964); Georgia: *Jackson v. Jackson*, 164 Ga. 115, 137 S.E. 827 (1927); Missouri: *State ex rel. Nelson v. Williams*, 249 S.W. 2d 506 (Mo. App. 1952); New Jersey: *Maloney v. Maloney*, 12 N.J. Misc. 397, 174 A. 28 (1934); New York: *Geary v. Geary*, 272 N.Y. 390, 6 N.E. 2d 67 (1936).

(b) Cases in which courts have held that *no* legal seizure is required and that a description of property is sufficient in order to grant alimony from property in which the spouse claims no pre-existing interest:

Arkansas: *Allen v. Allen*, 126 Ark. 164, 189 S.W. 841 (1916); Georgia: *Forrester v. Forrester*, 155 Ga. 722, 118 S.E. 373 (1923); *Jackson v. Jackson*, 164 Ga. 115, 137 S.E. 827 (1927); *Carter v. Bush*,

This cavalier treatment of the requirement of seizure and the rationale for its demise were expressed in the "Corrective Final Decree" of the Circuit Court below, where it is stated, "* * * seizure of land in such a case is little more than a form." Appendix C hereto, p. 5.

In substituting their own notions of due process for the principles established by this Court, some state courts have evolved the doctrine, adopted in this case by the Courts below as the law of Florida, that a published notice of suit or in the language of *Pennoyer* "substituted service by publication * * *," which contains a description of property intended to be proceeded against is sufficient, of itself, to satisfy the federal due process requirement of seizure in an *ex parte* divorce where alimony is sought, even though the claim is a purely personal claim which is sought to be satisfied from the property, and does *not* in

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216 Ga. 429, 116 S.E. 2d 568 (1960); *Cureton v. Cureton*, 218 Ga. 88, 126 S.E. 2d 666 (1962); Illinois: *Wilson v. Smart*, 324 Ill. 276, 155 N.E. 288 (1927); Iowa: *Harshberger v. Harshberger*, 26 Iowa 503 (1868); Kansas: *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090 (1896); North Carolina: *Bailey v. Bailey*, 127 N.C. 474, 37 S.E. 502 (1900); *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920); Ohio: *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684 (1929); Pennsylvania: *Reid v. Reid*, 28 Pa. D. & C. 2d 26 (1961); Tennessee: *Wilson v. Andrew*, 213 Tenn. 173, 375 S.W. 2d 650 (1963); Vermont: *Wilder v. Wilder*, 93 Vt. 105, 106 A. 562 (1919).

(c) Cases which have held that no seizure prior to judgment and no description of property are required to subject property to a personal claim for alimony although no pre-existing interest in the property is asserted:

Florida: *Burkhart v. Circuit Court of Eleventh Judicial Circuit*, 146 Fla. 457, 1 So. 2d 872 (1941); Iowa: *Twing v. O'Meara*, 59 Iowa 326, 13 N.W. 321 (1882); Kansas: *Campbell v. Campbell*, 144 Kan. 247, 58 P. 2d 1133 (1936); North Dakota: *McLean v. McLean*, 69 N.D. 665, 290 N.W. 913 (1940); Ohio: *Dexter v. Taylor*, 47 Ohio Ops. 398, 107 N.E. 2d 402 (1951).

any manner involve the title to the property.[9] The one-sentence opinion of the District Court of Appeal below states this proposition:

> "The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be

[9]The District Court of Appeal below relied upon three such decisions: *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090, 1092 (1896); "It is true that there was no formal seizure of the property, but a seizure of land in such a case is little more than a form * * *"; *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684, 688 (1929): "From the standpoint of practical remedy it would be futile to require the seizure of land which cannot be removed from the jurisdiction," and *Benner v. Benner*, 63 Ohio St. 220, 58 N.E. 569 (1900). The leading decision holding in accordance with *Pennington* and *Pennoyer* that a seizure is necessary is *Matthews v. Matthews*, 247 N.Y. 32, 159 N.E. 713, 714 (1928), a decision of the New York Court of Appeals under Chief Judge Cardozo: "And it is not enough that at the time judgment is rendered he in fact has property within our jurisdiction. The right to dispose of it rests upon a prior seizure. Only so does the defendant receive notice that he has rights which should be protected. It must therefore appear, before a judgment is entered purporting to deal with a non-resident's property, that by attachment, by injunction, by sequestration in some manner, the court has laid hands upon his property within the State." Other decisions in accord with *Pennoyer* and *Pennington* are *Bray v. Landergren*, 161 Va. 699, 172 S.E. 252, 256 (1934): "* * * The Arlington County Court had authority to seize this property and to hold it subject to such judgment as it might pronounce in favor of the wife. Had that been done, no question as to the constitutionality of its proceedings could have been raised and the doctrine of *Pennoyer v. Neff* could have had no application, but 'seizure of the commencement of the proceedings' was essential and there was none. There was nothing in the nature of sequestration. In the instant case the property was not seized before judgment," *Carter v. Carter*, 147 Conn. 238, 159 A. 2d 173 (1960); *Gimbel v. Gimbel*, 147 Conn. 561, 163 A. 2d 451 (1960); *Keen v. Keen*, 191 Md. 31, 60 A. 2d 200 (1948); *Reschofsky v. Reschofsky*, 272 App. Div. 694, 74 N.Y.S. 2d 636 (1947); *Myers v. Myers*, 131 Misc. 318, 227 N.Y.S. 13, affd. 225 App. Div. 776, 232 N.Y.S. 825 (1928); *Feldman v. Feldman*, 189 Miso. 564, 72 N.Y.S. 2d 923, on rehearing 189 Misc. 565, 72 N.Y.S. 2d 390 (1947).

subjected to the satisfaction of the claim for alimony and child support." Appendix B hereto, p. 2.

This doctrine is simply that in *ex parte* divorce a "* * * seizure at the commencement of proceedings * * *" in order that, "* * * property may be brought under the control of the court * * *" is not required for the satisfaction of a personal claim for alimony from the non-resident's property, even though no pre-existing interest in the property is claimed.

Petitioner submits that the doctrine adopted by the Florida courts below is directly contrary to the constitutional principles established by this Court in *Pennoyer* and *Pennington.*

The doctrine is dependent upon the state court's continuing position that alimony is not a personal right, but is merely an incident of divorce, which may be granted as a matter of *in rem* status by the state of "marital domicile" without regard to the federal due process principles regarding *in personam* and *quasi in rem* property jurisdiction. Such subordination of due process requirements directly conflicts, in addition, with the principles firmly established by the recent decisions of this Court in the area of "divisible divorce." See cases cited p. 11 hereto, *supra.*

In these decisions, which have made clear that judgments of alimony are "personal judgments" within the meaning of *Pennoyer*, *Armstrong v. Armstrong*, 350 U.S. 568, 576 (concurring opinion of Mr. Justice Black, Douglas, Clark and the Chief Justice) this Court has never

lent support to the view taken below, that the due process requirement of *seizure*, may be ignored in the alimony aspect of *ex parte* divorce, where no pre-existing interest in the property is claimed.

In *Vanderbilt v. Vanderbilt*, supra, this Court approved a *quasi in rem* alimony and support decree, but specifically pointed out that:

> "The New York Court did not have jurisdiction over him, but in order to satisfy his obligations, if any, to Mrs. Vanderbilt, *it sequestered his property within the State.*" 354 U.S. at 417, 77 S.Ct. at 1362.

In its footnote to this proposition the Court cited *Pennington.* The New York trial court described the procedure there followed which Petitioner submits could have been but was not followed herein, and is substantially required by *Pennington* and *Pennoyer:*

> "* * * defendant was served by order of publication herein, and, on the same date that the order for publication was made, an order of sequestration was granted herein, directing the seizure by the receiver named of defendant's property within the State of New York; the receiver thereupon acquired custody and control of moneys and property of the defendant and is still holding such property and money." *Vanderbilt v. Vanderbilt*, 138 N.Y.S. 2d 222, 228 (Sup.Ct. N.Y. (1955).

The Florida statute authorizing constructive service

of process by publication, Ch. 48 Fla. Stat. (1967) authorizes such process:

"Section 48.01 * * *

(4) For divorce or annulment of marriage;

* * *

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ of process shall have been issued and executed so as to place any property, fund or indebtedness in custodia legis."

Thus, had a receiver been appointed and had possession been taken of the property, had the property been sequestered, or had the property been brought into the custody of the court in any legally sufficient manner, the Florida statute and the Due Process Clause of the Constitution of the United States would have been satisfied.

Judgments for alimony in *ex parte* divorce must be rendered in accordance with the same due process of law as that required for other "personal judgments."

The issue raised by the rule adopted below which dispenses with the essential federal due process requirement of "* * * seizure at the commencement of the action * * *" in *ex parte* divorce and alimony proceedings, is im-

portant, substantial, and worthy of examination by this Court.

It is submitted that in this case the Court is squarely presented with the issue and has the opportunity to either bring to an end the flouting of these principles by state courts, or to determine that these principles are no longer required by the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Eugene Gressman
1730 K Street, N.W.
Washington, D.C.

Harvey J. Abel
2071 Main Street
Sarasota, Florida 33577

Allan Milledge
Richard L. Horn
150 S.E. 2nd Avenue
Miami, Florida, 33131
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ of Certiorari was mailed first class, postage prepaid to Sibley, Giblin and Levenson, 605 Lincoln Road, Miami Beach, Florida and Barrett and Diliberto, 608 Ainsley Building, Miami, Florida, attorneys for Respondent, Margaret F. Morton, Thomas C. Britton, Dade County Attorney, Dade County Courthouse, Miami, Florida, attorney for the Sheriff of Dade County, and Mershon, Sawyer, Johnston, Dunwody and Cole, 1600 First National Bank Building, Miami, Florida, attorneys for Intervenor Chase Manhattan Bank this 2 day of January, 1968

ALLAN MILLEDGE

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1967

No. _____

WHEATLAND HILLS CORP.,
a Delaware Corporation,

Petitioner,

v.

MARGARET F. MORTON,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1967
WEDNESDAY, OCTOBER 11, 1967

CASE NO. 36,596

DISTRICT COURT OF APPEAL, THIRD DISTRICT

WHEATLAND HILLS CORP., ETC.,
Petitioner,

vs.

MARGARET F. MORTON,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:
SID J. WHITE
Clerk Supreme Court.

CC: Hon. W. P. Carter
Hon. E. B. Leatherman
Messrs. Rosin & Abel
Messrs. Milledge & Horn
Messrs. Sibley, Giblin, Levenson & Ward
Hon. John R. Barrett; Hon. Maurice M. Diliberto

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A. D. 1967

CASE NO. 66-498

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

WHEATLAND HILLS CORP.,
a Delaware corporation,
Appellant,

vs.

MARGARET F. MORTON,
Appellee.

Opinion filed: May 9, 1967.

An Appeal from the Circuit Court for Dade County, William A. Herin, Judge.

Rutledge & Milledge; Rosin & Abel (Sarasota), for appellant.

Sibley, Giblin, Levenson & Ward, for appellee.

Before HENDRY, C.J., and CHARLES CARROLL and SWANN, JJ.

PER CURIAM.

The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be subjected to the satisfaction of the claim for alimony and child support. Having been shown no reversible error, the decree appealed is affirmed. State of Florida v. Jacksonville P. & M. R. R. Co., 16 Fla. 708,722 (1878); Klausner v. Ader, Fla.App. 1963, 156 So. 2d 193; Webb v. Webb, Fla.App.1963, 156 So.2d 698; Wesner v. O'Brien, 56 Kan. 724, 44 P. 1090 (1896); Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569 (1900); Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684. See Wagner v. Wagner, 293 F.2d 533,538 note 5 (D.C. Cir. 1961); Annotations 10 A.L.R.3d 212.

Affirmed.

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA, IN CHANCERY.

No. 64C 2201

(J. Herin)

WHEATLAND HILLS CORP.,
a Delaware Corporation,
Plaintiff,

vs.

MARGARET F. MORTON and TALMADGE A. BUCHANAN, As Sheriff of Dade County, Florida,
Defendants,

THE CHASE MANHATTAN BANK,
a Banking Corporation,
Petitioner,

RICHARD MORTON and EMIL MORTON,
Cross-Defendants.

CORRECTIVE FINAL DECREE

This cause came on to be heard after due notice on the Petition for Rehearing filed by The Chase Manhattan Bank; the Petition for Rehearing filed by Wheatland Hills Corp.; and the Motion for Clarification and Correction of Clerical Error filed by Margaret F. Morton; and

the Court having considered the same and having heard argument of counsel for the respective parties, and in all respects being fully advised in the premises, finds that there were certain clerical mistakes in the Final Decree and that certain phraseology in the Court's findings requires change. The Court thereupon enters the following as its Corrective Final Decree in this cause:

Richard and Margaret Morton, husband wife for fifteen years, the parents of two minor boys, and residents of Sarasota County, Florida, became involved in domestic relations proceedings. Margaret filed a suit against Richard on April 23, 1962, in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida, which court had jurisdiction over the marital status. Richard fled the jurisdiction of the Florida courts and was never personally served with process in the divorce suit. In said cause Margaret filed a second amended complaint, seeking thereby, among other things, in addition to a divorce and custody of the children, a decree charging in equity Richard's title and ownership in the Morton Towers property located in Dade County, Florida, for the payment of alimony and support for her and the children. The legal description of said property is as follows:

> Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida; said property lying and being in Dade County, Fla.

Richard was served by publication as required by law and the order of publication specifically described

the above property and gave Richard notice that Margaret's suit sought a decree charging it for support and alimony for herself and the children. A decree pro confesso having been rendered against Richard predicated upon said service, thereafter on September 9, 1963, a final decree was rendered, which, among other things, provided:

> "ORDERED, ADJUDGED AND DECREED as follows:
>
> 1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00), payable within ten (10) years in equal annual payments, which sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:
>
> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4, at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;
>
> * * *
>
> 7) That all of the sums awarded and directed to be paid herein shall constitute a lien against Defendant's interest in the property described as:

Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

* * *"

At the time the order of publication was rendered, and at the time Richard received actual notice of the filing of the Second Amended Complaint, he was the owner of an undivided eight per cent (8%) interest in the property above described. Thereafter, on October 4, 1962, Richard's father, Lawrence Morton, then and there holding a power of attorney from his son, conveyed Richard's interest and title in the above property to the plaintiff, Wheatland Hills Corp. The testimony indicates that this conveyance was made in order to protect the property from the effect of Margaret's suit and was prompted by the order of publication of the court in which notice was given that said property was being proceeded against.

The plaintiff, Wheatland Hills Corp., brought suit in the Eleventh Judicial Circuit in and for Dade County, Florida, seeking to quiet title to the property described in the final decree rendered as aforesaid, and sought to have this court strike it as a cloud on the plaintiff's title. Margaret, party defendant, answered and filed her cross-suit in which she seeks foreclosure of an an equitable lien imposed upon said property by the final decree.

Wheatland Hills Corp. is a corporation organized and existing under the laws of the State of Delaware.

Its three stockholders are Richard and his two brothers, each of whom owns an 8% interest in the real estate above described, and their interest in said real estate was conveyed to the plaintiff in exchange for all of its outstanding capital stock, one-third being issued to each of the sons. This was the only consideration given for the conveyance of the property.

An absconding father and husband, who avoids personal service by fleeing the jurisdiction of the courts of this State, leaving behind real property within the jurisdiction of this State, may thus escape personal liability for the payment of support and alimony to the deserted wife and children. Not so the property within the State; it remains subject to the processes of our courts and may be seized and sold to provide support for the abandoned wife and children.

The fleeing husband does not escape with his real property by the simple device of forming a corporation, after leaving the State, to which he conveys the title in exchange for the capital stock of the corporation. The courts of this State and their processes are not impotent in the face of this mockery. It is obvious that the courts of this State have the power to appropriate the absent husband's property to the payment of his obligation for the support of his wife and children, provided proper procedures are adopted to accomplish this end.

In *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565, it is pointed out by the Supreme Court of the United States, in speaking of the power of state courts, that "it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to sat-

isfy the claims of its citizens", and this may be accomplished by substituted service by publication "where the property is once brought under control of the court by seizure or some equivalent act".

Service by publication was accomplished in this cause and notice of the proceedings was received by Richard and the order requiring him to appear *specifically described the property against which Margaret was proceeding in said divorce suit*, giving to Richard full notice that it was the purpose of the suit to appropriate this property to the satisfaction and payment of the claims due her and her children for support.

In *Wesner* v. *O'Brien*, 56 Kan. 724, 44 P. 1090, the court said that the "seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice, which *warns the defendant that one of the purposes of the proceeding is the sequestration of the land*". This principle is cited with approval by the District Court of Appeal of Florida, Third District, in the case of *Webb* v. *Webb*, (1963) 156 So. 2d 698, 701.

Again, in *Reed* v. *Reed*, 121 Ohio St. 188, 167 N.E. 684, it was pointed out that the husband was a nonresident over whom the court did not obtain jurisdiction. However, the court held that since the complaint and the published notice to the defendant husband contained a particular description of the land sought to be appropriated, such notice was equal to a sequestration of the land.

The amount awarded to Margaret, and the creation of a lien upon the property for the payment of the award,

are matters which are finally concluded in the proceedings in the Twelfth Judicial Circuit. This Court is bound by those adjudications.

The Court being duly advised in the premises, it is ORDERED, ADJUDGED AND DECREED as follows:

(a) That the equity of this cause is with the defendant and cross-claimant, Margaret Morton, and is against the plaintiff and cross-defendants, Wheatland Hills Corp., Richard Morton and Emil Morton.

(b) The Court finds and declares that Margaret Morton has a valid and subsisting equitable lien upon the following described property:

> Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida,

for the total sum of $548,799.87, composed of the following items:

$450,000.00 awarded as permanent lump sum alimony and child support, payable within ten years in equal annual installments from September 9, 1963, of which $135,000.00 is past due, together with

$ 46,199.87, consisting of temporary arrearages, and
$ 45,000.00 attorneys' fees, and
$ 7,600.00 expert witnesses' fees,

making a total indebtedness past due of $233,799.87, and that the total sum of $548,799.87 constitutes and is a lien upon Richard Morton's 8% undivided interest in the above described property. This equitable lien in favor of Margaret Morton is subject to that certain assignment of rents and profits dated April 20, 1962, from Richard Morton to The Chase Manhattan Bank, and any sale provided for herein shall be subject to the rights of The Chase Manhattan Bank.

(c) The cross-defendant, Richard Morton, shall pay to the defendant and cross-claimant, Margaret Morton, forthwith, the amounts hereinabove recited as due, together with interest thereon from September 9, 1963 until paid, together with all costs of this suit taxed by the Clerk of this Court, Sheriff's fees, costs of publication, Special Master's fees, and all other costs of these proceedings.

(d) In default of said payment being made as hereinabove ordered, then the said undivided 8% interest in the above described property lying and being in Dade County, Florida, be sold at public auction for cash to the highest and best bidder at the south door of the County Courthouse in the City of Miami, Dade County, Florida, to satisfy this decree. Honorable Jack Abbott, Esquire, be and he is hereby designated and appointed as a Special Master of this Court to make and conduct said sale on a legal sale day during the legal hours of sale after first giving public notice of asle, time and place thereof, and causing said notice to be published once a week for four consecutive weeks in The Miami Review, a newspaper of general circulation published in Dade County, Florida,

and he is hereby authorized and directed to execute and carry into effect this decree.

(c) Out of the proceeds arising from the sale of the property herein ordered to be sold, the Master shall retain his fee and shall pay to the officials of the Court their costs herein, and shall pay to the attorneys for the cross-claimant, Margaret Morton, any attorneys' fees that may be hereinafter allowed in this cause; out of the remainder of said proceeds, as far as the same shall apply, there shall be paid to the cross-claimant, Margaret Morton, the sum of $233,799.87, with interest thereon from September 9, 1963 to the date of sale. If said property shall sell for more than enough to pay the cross-claimant the aforesaid sum now due to her with interest thereon, said Master shall report said overplus to this Court for this Court's order and the same shall thereupon be deposited in the Registry of the Clerk of this Court to be held as security for the balance due the cross-claimant, Margaret Morton, as hereinabove adjudicated.

(f) The plaintiff, Wheatland Hills corp., and cross-defendants, Richard Morton and Emil Morton, and all persons claiming by, through or under them since the commencement of this suit, shall be forever barred and foreclosed of any and all right, equity of redemption, claim, estate, or title in and to the above described property.

(g) Upon the execution and delivery of the Master's Deed to the purchaser at said sale, or his or its heirs, representatives, successors or assigns, he, it or they shall, without delay, be let into possession of the said premises so conveyed.

(h) The cross-claimant, Margaret Morton, shall be permitted to bid at the said Master's sale the total amount of the award made to her and, in the event she is the successful bidder, she shall only be required to pay the costs of court and Master's fee, the balance to be credited against the amount due or awarded to her as above set forth.

(i) The Court retains jurisdiction of this cause to render such orders and decrees as may be necessary to enforce the terms and conditions of this Corrective Final Decree.

DONE AND ORDERED in Chambers, at the Dade County Courthouse, Miami, Florida, this 19th day of April, 1966.

William A. Herin
Circuit Judge

APPENDIX D

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY. IN CHANCERY.

No. 15,339

MARGARET MORTON,

Plaintiff,

vs.

RICHARD MORTON,

Defendant.

SUPPLEMENTAL FINAL DECREE

This cause coming on to be heard before me for final hearing upon Plaintiff's bill of complaint and the Decree Pro Confesso heretofore entered herein, and the Court having considered carefully the evidence and testimony submitted and adduced in the trial of this cause, finds that the equities are decidedly with the Plaintiff wife and that she is entitled to the relief accorded by this decree, and whereas this Court has by its decree entered September 4, 1963, ordered, adjudged and decreed as follows:

1) That this Court has jurisdiction of this cause, the subject matter hereof, the persons of the Plaintiff and the two minor children of the parties hereto and the

property of the Defendant described in the complaint and lis pendens herein, and all property of the Defendant situate in the State of Florida.

2) That the Defendant, Richard Morton, has been duly and regularly served with constructive service in this cause, and has actual notice of this cause.

3) That the Plaintiff, Margaret Morton, by competent evidence has sustained the allegations of her complaint and that the equities of said cause are with the Plaintiff and she is hereby granted a decree of divorce, a vinculo matrimonii, from the Defendant, and the bonds of matrimony heretofore existing between Margaret Morton and Richard Morton be forever dissolved.

4) That the care, custody and control of the minor children of the parties, BRUCE MORTON, age 14, and GREGG MORTON, age 12, is awarded unto the Plaintiff, Margaret Morton.

5) That this Court finds upon a full consideration of the evidence, testimony and pleadings herein, that the Plaintiff is entitled to permanent lump sum alimony, permanent child support, permanent attorneys' fees and suit costs, and this Court reserves jurisdiction of this cause to determine the specific amounts thereof; further, this cause is hereby referred to a Special Master in Chancery for the purpose of taking testimony and evidence in support of Plaintiff's claim therefor and to make his findings of fact, conclusions of law and recommendations in respect thereof to this Court with all convenient speed.

6) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

And the Court having appointed a Special Master in Chancery for the purpose of taking testimony and making findings of fact, conclusions of law and recommendations with respect to lump sum permanent alimony, child support, attorneys' fees and Court costs, and said Special Master having filed his Special Master's Report before the Court, it is in consideration thereof, thereupon

ORDERED, ADJUDGED AND DECREED as follows:

1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of Four Hundred Fifty THOUSAND DOLLARS ($450,000.00); payable within ten (10) years in equal annual payments, which sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

TOGETHER with all other real and personal property of the Defendant of whatsoever nature located within the State of Florida; that the foregoing lump sum award

shall be allocated one-half (½) for the wife's alimony and one-half (½) for support of the minor children of the parties; that defendant's share in the mortgage debt on the above described property and other obligations of the Defendant were fully considered by this Court in making the foregoing determination of alimony and support; that the lump sum award in paragraph 1 hereof shall be payable in the sum of Forty Five THOUSAND DOLLARS ($45,000.00) per annum, commencing September 9, 1963, and a like sum of Forty Five THOUSAND DOLLARS ($45,000.00) on each successive 9th day of September hereafter until paid in full.

2) That the Plaintiff, Margaret Morton, is hereby awarded the residence property, together with the furniture and furnishings therein contained, located at 350 South Shore Drive, Sarasota, Florida, legally described as:

> Lot 15 and the westerly one-half (½) of Lot 16, a Resubdivision of Block "M", SAPPHIRE SHORES, as per plat thereof recorded in the Public Records of Sarasota County, Florida;

and this Decree shall be taken and considered in all courts of law or equity to have the same operation and effect as if a deed of conveyance had been executed by the Defendant, Richard Morton, who shall be conclusively deemed to have no interest whatsoever in said property, and the Plaintiff, Margaret Morton, shall be conclusively deemed to be the fee simple owner of said property. The equities of the parties therein have been fully computed and fully considered by the Court in making his deliberation and award.

3) That the Plaintiff is hereby awarded attorneys' fees in the sum of Forty Five THOUSAND DOLLARS ($45,000.00) for her attorneys of record in this cause. The foregoing sum shall be a lien upon the Defendant Richard Morton's interest in the property described in paragraph 1 of this Decree.

4) That the Plaintiff is hereby awarded court costs and expert witness fees in the sum of Seven Thousand Six Hundred DOLLARS ($7,600.00), which sum shall be a lien upon the Defendant Richard Morton's interest in the property descibed in paragraph 1 of this Decree.

5) That the Special Master's Report heretofore filed herein is hereby adopted, ratified and approved in every respect save and except the recommendations therein which are modified in accordance with this Decree.

6) That the Plaintiff is awarded the sum of Forty Six Thousand One Hundred Ninety Nine and 87/100 DOLLARS ($46,199.87), representing arrearages to date in unpaid temporary alimony, child support, attorneys' fees and Court costs, entered by this Court on November 9, 1962, which said sum shall be a lien upon Defendant Richard Morton's interest in the property described in Paragraph 1 of this Decree.

7) That all of the sums awarded and directed to be paid herein shall constitute a lien against Defendant's interest in the property described as:

Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat

Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

together with all other property of the Defendant located within the State of Florida and said property is hereby impressed with a lien for such purposes and to ensure the payment of the sums herein ordered to be paid, and said lien is hereby decreed to be a lien upon the assets of Defendant located within the State of Florida, for which let execution issue forthwith in accordance with this Decree.

8) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

DONE AN DORDERED in Chambers at Sarasota, Sarasota County, Florida, this 9 day of September, 1963.

/s/ John D. Justice
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR SARASOTA COUNTY. IN CHANCERY.

Case No. 15,339

MARGARET F. MORTON,

Plaintiff,

vs.

RICHARD MORTON,

Defendant.

TEMPORARY RESTRAINING ORDER

THIS CAUSE came on to be heard upon presentation of the plaintiff's sworn petition to enforce this Court's prior decree awarding her $457,000 for child support, alimony, attorneys' fees, and suit money, and it appearing to the Court that the defendant, RICHARD MORTON, has engaged in certain maneuvers to frustrate such prior adjudication by attempting to divest himself of all of his interest in the income from rents and profits derived from the operation of the Morton Towers and of the real property upon which such improvement and business operation is constructed and conducted, which said real property is described as follows, to-wit:

Lot 7, and the Southerly 1 foot of Lot 6, Block 43, Alton Beach Bay Front Subdivision according to the plat thereof, recorded in Plat Book 4, at Page 125 of the Public Records of Dade County, Florida;

and it further appearing to the Court that WHEATLAND HILLS CORP., EMIL MORTON, as Trustee, LAWRENCE MORTON, ROBERT W. NEWMAN and JANICE NEWMAN ROSENTHAL, jointly and severally, having either participated in the maneuvers of RICHARD MORTON to frustrate this Court's prior adjudication, as stated above, or claim some interest, or have some control over the subject res, it is, thereupon,

ORDERED, ADJUDGED and DECREED:

1. That WHEATLAND HILLS CORP., EMIL MORTON, as Trustee, LAWRENCE MORTON, ROBERT W. NEWMAN, and JANICE NEWMAN ROSENTHAL be and they are hereby made parties defendant to this cause, and, they and each of them, shall be afforded notice and an opportunity to be heard in this cause and legal process in accordance with the laws of the State of Florida shall issue to that end.

2. That pending the adjudication of the rights of the parties in regard to the aforementioned sworn petition filed by the plaintiff to enforce this Court's prior adjudication awarding her the sum of $457,000 for child support, alimony, suit money and attorneys' fees, the parties are enjoined and restrained until further order of this Court from disposing of or in any way encumbering the above-described real property.

3. It is the purpose of this order to preserve the status quo and to take into custodia legis the above-described res which is within the jurisdiction of this Court pending the adjudication of the rights of all parties to this cause.

DONE and ORDERED at the Sarasota County Courthouse, Sarasota, Florida, on this 25 day of August, 1964.

/s/ John D. Justice
Circuit Judge

APPENDIX F

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA.
IN CHANCERY.

Case No. 15,339

MARGARET F. MORTON,
Plaintiff,

vs.

RICHARD MORTON, et al.,
Defendants.

ORDER

Some question having been raised regarding the clarity of a prior order of this Court, it is, thereupon,

ORDERED, ADJUDGED and DECREED that the temporary restraining order rendered by this Court on August 25, 1964, was entered to seize and bring into custodia legis all the interest, estate, and title to the real property described therein held or claimed by WHEATLAND HILLS CORP., acquired by it from RICHARD MORTON, the title to which was held by said RICHARD MORTON. This is and was the language intent and purpose of said temporary restraining order and is hereby so clarified.

DONE and ORDERED at the Sarasota County Courthouse, Sarasota, Florida, on this 5 day of Oct., 1964.

/s/ John D. Justice
Circuit Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 986

WHEATLAND HILLS CORP.,
a Delaware corporation,
Petitioner,

vs.

MARGARET F. MORTON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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a Delaware corporation,
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MARGARET F. MORTON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFACE

The case at bar involves the enforcement of a quasi in rem alimony decree rendered in 1963 by the Circuit Court

of the Twelfth Judicial Circuit, in and for Sarasota County, Florida, in that certain case therein lately pending styled *Margaret F. Morton* v. *Richard Morton,* bearing case No. 15,339 (Stipulated Exhibit E; R 322). That final decree was collaterally attacked in this case in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, by the petitioner, Wheatland Hills Corp., a Delaware corporation (R 28). The respondent, Margaret F. Morton, counter sued in this case for the enforcement of the previously rendered final decree (R 94-129).

The petitioner, in its zeal to capture the imagination of the Court for the purpose of causing a writ of certiorari to issue, culled the facts and turned them on a verbal lathe to create the appearance that this Court has jurisdiction and that the petitioner's constitutional right of due process of law had been violated. A full and complete presentation of the facts is necessary and will demonstrate the following:

A. That this Court does not have jurisdiction of this case because the petition was unseasonable and filed out of time;

B. That this case does not represent in any way a violation of the constitutionally guaranteed right to due process of law;

C. That the petitioner is not asserting a violation of its constitutional right to due process of law but rather someone else's; and

D. That a decision of the alleged constitutional question is not unavoidable in order for the state courts to have adjudicated this case.

Consequently the respondent shall undertake to present a full and complete statement of the factual and procedural background of this cause.

FLORIDA CONSTITUTION, STATUTES AND RULES INVOLVED

The following is a list of the Florida constitutional provision, statutes and an applicable rule of appellate procedure involved in this case, which are quite lengthy; thus their text is set forth in the appendix to this brief.

1. Article V, Section 4, entitled "Supreme Court", subsection (2), entitled "Jurisdiction", Constitution of the State of Florida.

2. Florida Appellate Rule 1.3 defining the term "Rendition."

3. Section 48.08, Florida Statutes, 1961, entitled "Notice of suit, form."

4. Section 48.09, Florida Statutes, 1961, entitled "Notice of suit, return day."

5. Section 48.10, Florida Statutes, 1961, entitled "Notice of suit, publication, proof and recording thereof."

6. Section 48.13, Florida Statutes, 1961, entitled "Notice of suit, mailing of."

STATEMENT OF THE CASE

A) Factual Highlights of the Sarasota Divorce Litigation Between Margaret F. Morton and Richard Morton

RICHARD and MARGARET MORTON, husband and wife for fifteen (15) years, the parents of two (2) boys, and long-time residents of Sarasota County, Florida, became embroiled in marital difficulties. Prior to the actual commencement of the marital litigation in the Sarasota Circuit Court, RICHARD MORTON abandoned his family and fled the jurisdiction of Florida to avoid personal service of

process. The entire record of the Sarasota Circuit Court divorce file, including the progress docket, were admitted in evidence at the trial of this case as Stipulated Exhibit "E" (R 322). A concise outline of what occurred in that case follows:

A. On April 23, 1962, the Sarasota marital litigation was begun by the filing of a bill of complaint by MARGARET F. MORTON against RICHARD MORTON. The record reflects the issuance of an original summons in chancery, as well as alias process returned unexecuted.

B. On July 9, 1962, an amended complaint was filed, notice of suit duly issued on the same day, and a copy of the notice furnished to the press for publication, and a copy of the notice together with the amended bill of complaint furnished by mail by the clerk to RICHARD MORTON in Mississippi. Such notice was duly published in the Sarasota Herald Tribune on July 11, 18, 25, and August 1, 1962.

C. On August 8, 1962, MARGARET F. MORTON filed a sworn petition for the issuance of a restraining order outlining, in detail, RICHARD MORTON's abandonment of his family and his fleeing the jurisdiction of Florida to avoid personal service of process in an attempt to frustrate the jurisdiction and power of the courts of Florida to make monetary provision for the support of his family. On that same date, the court issued an order prohibiting the transfer or concealment by RICHARD MORTON, or his agents, of any of his assets within the State of Florida.

D. The injunctive order of August 8, 1962, was duly served in person upon several members of the MORTON family, including RICHARD MORTON's brother, ALAN MORTON, and their uncle, EMIL MORTON, each of whom owns an interest in the MORTON TOWERS property.

EMIL MORTON is and was the member of the MORTON family who acts as agent for all other owners of the MORTON TOWERS property, with possession, custody and managerial control of that property (Stipulated Exhibit D; R 320).

E. On August 20, 1962, MARGARET F. MORTON filed a motion for leave to file a second amended complaint, which was granted on the same day, and, on that day, she filed her second amended complaint. In that second amended complaint, MARGARET F. MORTON alleged, under oath, that RICHARD MORTON owned real property situated in four (4) Florida counties, namely, Manatee, Sarasota, Dade and Broward. The complaint specifically describes, by lot, block, plat book and page number of the Public Records of Dade County, Florida, RICHARD MORTON's eight (8%) percent undivided title and ownership in the MORTON TOWERS property.

F. An affidavit of counsel for MARGARET F. MORTON filed on August 27, 1962, with registered mail, return receipts executed by RICHARD MORTON attached, establishes that RICHARD MORTON was furnished with a certified copy of the injunctive order of August 8, 1962, and a true and correct copy of the second amended complaint.

G. On September 20, 1962, an affidavit in support of service by publication was filed in strict compliance with the provisions of Florida Statutes, Chapter 48.08 (Appendix, p. A2), reflecting all of the statutory requisites, including RICHARD MORTON's residence at a specified place in Jackson, Mississippi.

H. On September 20, 1962, the clerk of the Sarasota Circuit Court duly issued a notice of suit, in strict compliance with the provisions of Florida Statutes, Chapter 48.08 (Appendix, p. A2), addressed to the defendant,

RICHARD MORTON, at his residence address in Jackson, Mississippi, notifying RICHARD MORTON of the filing of the second amended complaint and that the relief sought was an absolute divorce and alimony, and that the plaintiff was proceeding against specifically described property. Subsection 4, of Section 48.08, Florida Statutes (Appendix, p. A2), requires that the notice of suit shall set forth:

> *"The description of real property, if any, proceeded against."* (Emphasis supplied.)

That notice of suit specifically describes RICHARD MORTON's title and ownership in real property located in Sarasota County, Florida and in Dade County, Florida. It describes RICHARD MORTON's interest in the MORTON TOWERS real property in Dade County, Florida, as follows:

> "Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4 at page 125, public records of Dade County, Florida; said property lying and being in Dade County, Fla."

The notice of suit also specifically describes, as property being proceeded against, RICHARD MORTON's interest in the marital residence of the parties located in Sarasota County, Florida, as follows:

> "Lot 15 and Westerly 1/2 of Lot 16, a resubdivision of Block M, Sapphire Shores, as per Plat thereof recorded in the public records of Sarasota County, Florida; said property lying and being in Sarasota County, Florida."

Consequently, the notice of suit establishes, by specific description, that two (2) parcels of real property, located in Florida, in two (2) different counties, namely, Sarasota and Dade, were being proceeded against. The progress docket reflects that this notice of suit was made and filed on September 20, 1962, and was furnished that day to the press

for publication, and that the clerk mailed a copy of that notice, together with a copy of the second amended complaint, to RICHARD MORTON, in strict compliance with the provisions of Florida Statutes, Chapter 48.13 (Appendix, p. A3). The return day specified in the notice of suit was October 23, 1962.

I. On October 18, 1962, proof of publication that the mentioned notice of suit had been duly published was filed. That proof of publication strictly complied with the provisions of Florida Statutes, Chapter 48.10(2) (Appendix, p. A3). The proof of publication establishes that the notice of suit, which specified and described by lot, block, plat book and page of the public records of Dade County, Florida, RICHARD MORTON's title and ownership in the MORTON TOWERS property, together with a similar specification and description of the marital residence in Sarasota County, Florida, was published once each week for four (4) consecutive weeks in the Sarasota Herald Tribune, in strict compliance with the provisions of Florida Statutes, Chapter 48.10(1) (Appendix, p. A3). The dates of publication were September 21st and 28th and October 5th and 12th, 1962* The first publication took place on September 21, 1962, and the return day was October 23, 1962, and that afforded the defendant, RICHARD MORTON, thirty (30) days from the date of the first publication within which to appeal and defend by filing appropriate pleadings and was within the period of no less than twenty-eight (28) days and no more than sixty (60) days, provided for in Florida Statutes, Chapter 48.09 (Appendix, p. A2). Consequently constructive service of process regarding MARGA-

*NOTE: It will be demonstrated, on pages 15-19 of this brief, that RICHARD MORTON and his family, on October 4, 1962, fraudulently conveyed RICHARD's interest in the MORTON TOWERS' property to the petitioner, WHEATLAND HILLS CORP., in an effort to defeat the Sarasota Circuit Court's jurisdiction and thereby deprive Mrs. MORTON and her children of alimony and child support.

RET F. MORTON's second amended complaint, specifically describing RICHARD MORTON's title and ownership in the MORTON TOWERS property in Dade County, Florida, and the marital residence in Sarasota County, Florida, as the property proceeded against, was effectuated in strict, absolute compliance with the applicable and governing provisions of Florida Statutes, Chapter 48, regulating constructive service of process.

J. On August 29, *1963*, a decree pro confesso was entered against RICHARD MORTON stating, inter alia, as follows:

> "THIS CAUSE, coming on to be heard on this date upon Plaintiff's Motion for Decree Pro Confesso against the Defendant, RICHARD MORTON, and it appearing to the Court that the Defendant has been duly and regularly served by constructive service in accordance with the laws of the State of Florida and has failed to appear, answer, or move to dismiss the second amended bill of complaint herein or otherwise plead as required by the process of this Court up to and including the 29 day of August, 1963, it is ordered, adjudged and decreed that the second amended bill of complaint be taken as confessed."

K. On September 3, 1963, a petition was filed in the Sarasota County Circuit Court challenging, as fraudulent, the conveyance of RICHARD MORTON's interest in the MORTON TOWERS property, during the pendency of that litigation, to WHEATLAND HILLS CORP., a Delaware corporation, and the court entered an order finding that conveyance to be fraudulent upon the wife and that it in no way diminished the power of the court to award alimony, child support, suit money and attorneys' fees against RICHARD MORTON. The pertinent excerpts from the provisions of that order of September 3, 1963, read thusly:

"That that certain Warranty Deed dated October 4, 1962 purportedly conveying Defendant Richard Morton's undivided 8% interest in certain realty in Dade County, Florida to Wheatland Hills Corp., a Delaware corporation, was fraudulent as to the Plaintiff and was made in bad faith and, further, was in contempt of and in contravention of this Court's Temporary Restraining Order of August 8, 1962. . . .

Inasmuch, therefore, that this Court has found that the said deed of October 4, 1962 is fraudulent, this Court shall not consider the property so conveyed as in any way diminishing the estate of the Defendant for the purposes of assessing alimony and support, court costs and attorneys' fees, the Court concluding that equity should not permit the Defendant to benefit by his fraud.

IT IS FURTHER ORDERED AND DECREED that subject only to the rights of Wheatland Hills Corp., if any, in and to the property described in the aforesaid Warranty Deed, the Defendant's interest in and to the property hereinbelow described shall be subject to a prior and continuing lien of the Plaintiff for alimony and support, court costs and attorneys' fees. The property contained in the said Warranty Deed is described as follows, to wit:

Lot 7, plus the Southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4, at Page 125, of the Public Records of Dade County, Florida.

IT IS FURTHER ORDERED AND DECREED that the aforedescribed interest of Richard Morton in and to the aforedescribed property be and the same is held as security for such further orders and decrees as shall be entered by this Court.

DONE AND ORDERED in Chambers at Sarasota, Florida, this 3 day of September, 1963.

/s/ John D. Justice
Circuit Judge"

L. On September 4, 1963, a final decree of divorce was rendered. In that decree, the court referred the financial aspects of the case to a special master in chancery, and reserved jurisdiction for the entry of a supplemental final decree.

M. On September 9, 1963, the special master's report was filed, the pertinent factual findings of which read as follows:

> "I find that the net worth of the defendant, RICHARD MORTON, is in excess of Two Million, Five Hundred Thousand Dollars ($2,500,000.00). The standard of living established by the defendant for the plaintiff during their fourteen (14) years of marriage was in excess of Sixty Thousand Dollars ($60,000.00) per year for personal and domestic expenses. This is exclusive of such items as cars and maintenance thereof, maintenance of home and grounds, vacations, travel and other fringe expenditures which were paid for from defendant's corporate sources. That the defendant owns an eight percent (8%) undivided interest in that certain complex of real and personal property located in Dade County, Florida known as Morton Towers. Morton Towers is valued at Twenty-five Million Dollars ($25,000,000.00), at present fair market value.
>
> 2) I find, further, that defendant's ownership of such eight percent (8%) interest returns an annual net income, after operating expenses but before debt cost, of in excess of Two Hundred Forty-Five Thousand Dollars ($245,000.00)."

N. On September 9, 1963, upon the filing of the special master's report, a supplemental final decree was entered in words and figures, as follows:

> "This cause coming on to be heard before me for final hearing upon Plaintiff's bill of complaint and the Decree Pro Confesso heretofore entered herein, and the Court having considered carefully the evidence and testimony submitted and adduced in the trial of this

cause, finds that the equities are decidedly with the Plaintiff wife and that she is entitled to the relief accorded by this decree, and whereas this Court has by its decree entered September 4, 1963, ordered, adjudged and decreed as follows:

1) That this Court has jurisdiction of this cause, the subject matter hereof, the persons of the Plaintiff and the two minor children of the parties hereto and the property of the Defendant described in the complaint and lis pendens herein, and all property of the Defendant situate in the State of Florida.

2) That the Defendant, Richard Morton, has been duly and regularly served with constructive service in this cause, and has actual notice of this cause.

3) That the Plaintiff, Margaret Morton, by competent evidence has sustained the allegations of her complaint and that the equities of said cause are with the Plaintiff and she is hereby granted a decree of divorce, a vinculo matrimonii, from the Defendant, and the bonds of matrimony heretofore existing between Margaret Morton and Richard Morton be forever dissolved.

4) That the care, custody and control of the minor children of the parties, BRUCE MORTON, age 14, and GREGG MORTON, age 12, is awarded unto the Plaintiff, Margaret Morton.

5) That this Court finds upon a full consideration of the evidence, testimony and pleadings herein, that the Plaintiff is entitled to permanent lump sum alimony, permanent child support, permanent attorneys' fees and suit costs, and this Court reserves jurisdiction of this cause to determine the specific amounts thereof; further, this cause is hereby referred to a Special Master in Chancery for the purpose of taking testimony and evidence in support of Plaintiff's claim therefor and to make his findings of fact, conclusions of law and recommendations in respect thereof to this Court with all convenient speed.

6) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

And the Court having appointed a Special Master in Chancery for the purpose of taking testimony and making findings of fact, conclusions of law and recommendations with respect to lump sum permanent alimony, child support, attorneys' fees and Court costs, and said Special Master having filed his Special Master's Report before the Court, it is in consideration thereof, thereupon

ORDERED, ADJUDGED AND DECREED as follows:

1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00), payable within ten (10) years in equal annual payments, which sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:

Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

TOGETHER with all other real and personal property of the Defendant of whatsoever nature located within the State of Florida; that the foregoing lump sum award shall be allocated one-half (1/2) for the wife's alimony and one-half (1/2) for support of the minor children of the parties; that defendant's share in the mortgage debt on the above described property, and other obligations of the Defendant were fully considered by this Court in making the foregoing determination of alimony and support; that the lump sum award in para-

graph 1 hereof shall be payable in the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) per annum, commencing September 9, 1963, and a like sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) on each successive 9th day of September hereafter until paid in full.

2) That the Plaintiff, Margaret Morton, is hereby awarded the residence property, together with the furniture and furnishings therein contained, located at 350 South Shore Drive, Sarasota, Florida, legally described as:

> Lot 15 and the westerly one-half (1/2) of Lot 16, a Re-subdivision of Block 'M', SAPPHIRE SHORES, as per plat thereon recorded in the Public Records of Sarasota County, Florida;

and this Decree shall be taken and considered in all courts of law or equity to have the same operation and effect as if a deed of conveyance had been executed by the Defendant, Richard Morton, who shall be conclusively deemed to have no interest whatsoever in said property, and the Plaintiff, Margaret Morton, shall be conclusively deemed to be the fee simple owner of said property. The equities of the parties therein have been fully computed and fully considered by the Court in making his deliberation and award.

3) That the Plaintiff is hereby awarded attorneys' fees in the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) for her attorneys of record in this cause. The foregoing sum shall be a lien upon the Defendant Richard Morton's interest in the property described in paragraph 1 of this Decree.

4) That the Plaintiff is hereby awarded court costs and expert witness fees in the sum of SEVEN THOUSAND SIX HUNDRED DOLLARS ($7,600.00), which sum shall be a lien upon the Defendant Richard Morton's interest in the property described in paragraph 1 of this Decree.

5) That the Special Master's Report heretofore filed herein is hereby adopted, ratified and approved in every respect save and except the recommendations therein which are modified in accordance with this Decree.

6) That the Plaintiff is awarded the sum of FORTY SIX THOUSAND ONE HUNDRED NINETY NINE and 87/100 DOLLARS ($46,199.87), representing arrearages to date in unpaid temporary alimony, child support, attorneys' fees and Court costs, entered by this Court on November 9, 1962, which said sum shall be a lien upon Defendant Richard Morton's interest in the property described in Paragraph 1 of this Decree.

7) That all of the sums awarded and directed to be paid herein shall constitute a lien against Defendant's interest in the property described as:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

together with all other property of the Defendant located within the State of Florida and said property is hereby impressed with a lien for such purposes and to ensure the payment of the sums herein ordered to be paid, and said lien is hereby decreed to be a lien upon the assets of Defendant located within the State of Florida, for which let execution issue forthwith in accordance with this Decree.

8) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

DONE AND ORDERED in Chambers at Sarasota, Sarasota County, Florida, this 9 day of September, 1963.

/s/ John D. Justice
CIRCUIT JUDGE"

O) NO APPEAL was ever taken from any of the orders or the final decree entered in the Sarasota County Circuit court divorce litigation.

B) Morton Family's Manipulation of Dade County Property During Pendency of Sarasota Litigation

While the Sarasota marital litigation was pending, the Morton dynasty, as one of its senior members, Mr. Sidney Newman testified, at the trial of this cause (R 337-345), upon receipt of the notice that RICHARD MORTON's wife and children sought to subject and were proceeding against RICHARD MORTON's interest in the family's TWENTY-FIVE MILLION ($25,000,000.00) DOLLAR MORTON TOWERS project in order to satisfy their bona fide claim for alimony and child support, closed ranks and organized and devised a corporate scheme in an attempt to divest the Sarasota Circuit Court of jurisdiction and deprive RICHARD MORTON's wife and children of the relief to which they were entitled. Here is what happened and how WHEATLAND HILLS CORP., the petitioner in this proceeding, got interjected into this matter:.

A. Subsequent to the entry of the temporary restraining order of August 8, 1962, prohibiting RICHARD MORTON or his agents from transferring any of his property and after the first publication of the notice of suit on September 21, 1962, which specifically described RICHARD MORTON's interest in the MORTON TOWERS property, as property being proceeded against for the claim of alimony, child support, attorneys' fees and court costs,

the MORTON family, on October 3, 1962, caused to be organized and created, under and by virtue of the laws of the State of Delaware, the corporation called WHEATLAND HILLS CORP. (R 193-197; Stipulated Facts, Paragraph VI).

B. On October 4, 1962, LAWRENCE MORTON, the father of RICHARD MORTON, pursuant to a power of attorney given to LAWRENCE MORTON on December 28, 1959, by his three (3) sons (RICHARD, ALAN and JAMES MORTON), conveyed RICHARD MORTON's eight (8%) percent title and ownership in the MORTON TOWERS property to WHEATLAND HILLS CORP., a Delaware corporation, organized and created the day before. That deed (Def. Ex. 1; R 328) was recorded among the Public Records of Dade County, Florida, on the following day, namely, October 5, 1962, in Official Records Book 3353, at Page 320. Prior to that, there had been spread upon the public records of Dade County, Florida, a red flag in the form of a revocation of LAWRENCE MORTON's power of attorney by MARGARET MORTON. The revocation dated September 13, 1962, was filed and recorded among the Public Records of Dade County, Florida, on September 14, 1962 (Stipulated Exhibit G; R 326). That revocation of the power of attorney, which was thereafter purportedly exercised by LAWRENCE MORTON to perpetrate a fraud upon MARGARET MORTON, was additional notice above and beyond the notice that the MORTON family had previously and admittedly received, which would have forestalled and precluded any bona fide purchaser from taking title.

C. The Stipulated Facts (R 193-197) further establish that the corporate device, in the form of WHEATLAND HILLS CORP., a Delaware corporation, was an illusory transaction. Admittedly, WHEATLAND HILLS CORP.

paid nothing for the land it purportedly received on October 4, 1962, which was under seizure at that time in the Sarasota divorce suit. RICHARD MORTON merely converted his title and ownership in the seized property in Florida for stock in a foreign corporation. Moreover, the answers to interrogatories by THE CHASE MANHATTAN BANK (Def. Ex. 5; R 333 and 187-190), establishes that the corporate shell of WHEATLAND HILLS CORP. in no way affected RICHARD MORTON's title and ownership to eight (8%) percent of the MORTON TOWERS property, because he was permitted by THE CHASE MANHATTAN BANK, on December 17, 1962, to increase his personal loan by SIXTY-FIVE THOUSAND EIGHT HUNDRED SIX & 50/100THS ($65,806.50) DOLLARS and has, thereafter, had the benefit of the rents and profits from the MORTON TOWERS property applied in payment of that personal debt. Initially, RICHARD MORTON borrowed THREE HUNDRED TWENTY-FIVE THOUSAND ($325,000.00) DOLLARS from THE CHASE MANHATTAN BANK in order to repay his father the money that was advanced for his (RICHARD MORTON's) interest in the MORTON TOWERS property, and he assigned to that bank all of the income, rents and profits accruing from his proportionate title and ownership in the said property (R 193-197, Stipulated Facts, Paragraph IV). Additionally, the managerial possession and control of the property by EMIL MORTON has similarly remained totally unchanged by the WHEATLAND HILLS transaction. Moreover, certain Circuit Court files were admitted in evidence as Defendant's Exhibits 3 and 4 (R 332), which establish that, in 1963, RICHARD MORTON, with the other members of the MORTON dynasty, filed suit in their own names, as the owners of the fee simple title to the MORTON TOWERS property, against the taxing authori-

ties of Dade County, Florida, seeking a reduction in the assessment on the MORTON TOWERS property. Mr. Sidney Newman attributed that suit to "stupidity" (R 343), but it was, in fact, candor, because the lawyer who brought that suit knew of the existence of WHEATLAND HILLS CORP., because the other suit, brought by the same lawyer that Newman called stupid, was concluded less than a month before the tax suit was brought, and that earlier case mentions WHEATLAND HILLS CORP. It was apparent that the MORTON dynasty castigated as stupid, a truthful revelation of the genuine status of the title to the MORTON TOWERS property, showing that RICHARD MORTON still maintained his direct title and interest in the land, because it reveals the scheme to deprive MARGARET F. MORTON and her children of their just entitlement. At the conclusion of the final hearing in this cause, the chancellor below made the following observation (SR 32-33):

> ". . . Mr. Newman, as the witness very frankly stated that when they saw the red light flashing down in Florida that something was about to happen, they did not want anything to happen to this development and so they immediately took steps to try to see that nothing would happen to it."

The chancellor's observation, based on the facts in evidence, cryptically summarizes the truth and entirely eliminates any question as to the bona fides of the conveyance to WHEATLAND HILLS CORP.

Briefly summarized, the pertinent facts of this case establish, absent contradiction, that after the Sarasota Circuit Court duly exercised its jurisdiction by the entry of an injunctive order prohibiting the transfer of any of RICHARD MORTON's property in Florida, by himself or his agents, and seized his property in Florida by authorized

legal process that was duly issued and published, notifying RICHARD MORTON and his family that his eight (8%) percent title and ownership in the MORTON TOWERS property was being proceeded against in order to satisfy the claim of his wife and children for alimony, child support, suit money and attorneys' fees, the property was conveyed with notice and without valuable consideration to a dummy corporation (the Petitioner); so that RICHARD MORTON might continue to enjoy all of the benefits of ownership, purportedly defeat the jurisdiction of the courts of Florida, and escape the burden of meeting his just obligation to his wife and children.

C) This Case

As stated at the outset, in the preface to this brief, Wheatland Hills Corp. instituted this litigation to collaterally attack the final decree of divorce that had been rendered in the Sarasota divorce litigation between Richard and Margaret Morton. Margaret Morton counterclaimed in this case for the enforcement of the monetary provisions of the previously rendered final decree.

After a full final hearing in this cause, the chancellor rendered a final decree in which it was found that the Sarasota Circuit Court had subject matter jurisdiction of the Morton divorce litigation as well as the power to declare an equitable lien upon Richard Morton's title and ownership in the Morton Towers property located in Dade County, Florida. The final decree found that Richard Morton had been duly served by publication "as required by law" and that the order of publication specifically described the Morton Towers property in Dade County, Florida, as property being proceeded against for the purpose of charging it for support and alimony for his wife and children. The full text of that decree, excluding the introductory paragraph, reads as follows (R 413-420):

"Richard and Margaret Morton, husband and wife for fifteen years, the parents of two minor boys, and residents of Sarasota County, Florida, became involved in domestic relations proceedings. Margaret filed a suit against Richard on April 23, 1962, in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida, which court had jurisdiction over the marital status. Richard fled the jurisdiction of the Florida courts and was never personally served with process in the divorce suit. In said cause Margaret filed a second amended complaint, seeking thereby, among other things, in addition to a divorce and custody of the children, a decree charging in equity Richard's title and ownership in the Morton Towers property located in Dade County, Florida, for the payment of alimony and support for her and the children. The legal description of said property is as follows:

> Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida; said property lying and being in Dade County, Fla.

Richard was served by publication as required by law and the order of publication specifically described the above property and gave Richard notice that Margaret's suit sought a decree charging it for support and alimony for herself and the children. A decree pro confesso having been rendered against Richard predicated upon said service, thereafter on September 9, 1963, a final decree was rendered, which, among other things, provided:

> 'ORDERED, ADJUDGED AND DECREED as follows:
>
> 1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00), payable within ten (10) years equal annual payments, which

sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;
> * * *

7) That all of the sums awarded and directed to be paid herein shall constitute a lien against defendant's interest in the property described as:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Maimi Beach, Florida;
> * * *'

At the time the order of publication was rendered, and at the time Richard received actual notice of the filing of the Second Amended Complaint, he was the owner of an undivided eight per cent (8%) interest in the property above described. Thereafter, on October 4, 1962, Richard's father, Lawrence Morton, then and there holding a power of attorney from his son, conveyed Richard's interest and title in the above property to the plaintiff Wheatland Hills Corp. The testimony indicates that this conveyance was made in order to protect the property from the effect of Margaret's suit and was prompted by the order of publication of the court in which notice was given that said property was being proceeded against.

The plaintiff, Wheatland Hills Corp., brought suit in the Eleventh Judicial Circuit in and for Dade County, Florida, seeking to quiet title to the property

described in the final decree rendered as aforesaid, and sought to have this court strike it as a cloud on the plaintiff's title. Margaret, party defendant, answered and filed her cross-suit in which she seeks foreclosure of an equitable lien imposed upon said property by the final decree.

Wheatland Hills Corp. is a corporation organized and existing under the laws of the State of Delaware. Its three stockholders are Richard and his two brothers, each of whom owns an 8% interest in the real estate above described, and their interest in said real estate was conveyed to the plaintiff in exchange for all of its outstanding capital stock, one-third being issued to each of the sons. This was the only consideration given for the conveyance of the property.

An absconding father and husband, who avoids personal service by fleeing the jurisdiction of the courts of this State, leaving behind real property within the jurisdiction of this State, may thus escape personal liability for the payment of support and alimony to the deserted wife and children. Not so the property within the State; it remains subject to the processes of our courts and may be seized and sold to provide support for the abandoned wife and children.

The fleeing husband does not escape with his real property by the simple device of forming a corporation, after leaving the State, to which he conveys the title in exchange for the capital stock of the corporation. The courts of this State and their processes are not impotent in the face of this mockery. It is obvious that the courts of this State have the power to appropriate the absent husband's property to the payment of his obligation for the support of his wife and children, provided proper procedures are adopted to accomplish this end.

In *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.Ed. 565, it is pointed out by the Supreme Court of the United

States, in speaking of the power of state courts, that 'it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens', and this may be accomplished by substituted service by publication 'where the property is once brought under control of the court by seizure or some equivalent act'.

Service by publication was accomplished in this cause and notice of the proceedings was received by Richard and the order requiring him to appear *specifically described the property against which Margaret was proceeding in said divorce suit,* giving to Richard full notice that it was the purpose of the suit to appropriate this property to the satisfaction and payment of the claims due her and her children for support.

Again, in *Reed* v. *Reed,* 121 Ohio St. 188, 167 N.E. 684, it was pointed out that the husband was a non-resident over whom the court did not obtain jurisdiction. However, the court held that since the complaint and the published notice to the defendant husband contained a particular description of the land sought to be appropriated, such notice was equal to a sequestration of the land.

The amount awarded to Margaret, and the creation of a lien upon the property for the payment of the award, are matters which are finally concluded in the proceedings in the Twelfth Judicial Circuit. This Court is bound by those adjudications.

The Court being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED as follows:

(a) That the equity of this cause is with the defendant and cross-claimant, Margaret Morton, and is against the plaintiff and cross-defendants, Wheatland Hills Corp., Richard Morton and Emil Morton.

(b) The Court finds and declares that Margaret Morton has a valid and subsisting equitable lien upon the following described property:

Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida,

for the total sum of $548,799.87, composed of the following items:

$450,000.00 awarded as permanent lump sum alimony and child support, payable within ten years in equal annual installments from September 9, 1963, of which $135,000.00 is past due, together with

$46,199.87, consisting of temporary arrearages, and
$45,000.00 attorneys' fees, and
$7,600.00 expert witnesses' fees,

making a total indebtedness past due of $233,799.87, and that the total sum of $548,799.87 constitutes and is a lien upon Richard Morton's 8% undivided interest in the above described property. This equitable lien in favor of Margaret Morton is subject to that certain assignment of rents and profits dated April 20, 1962, from Richard Morton to The Chase Manhattan Bank, and any sale provided for herein shall be subject to the rights of The Chase Manhattan Bank.

(c) The cross-defendant, Richard Morton, shall pay to the defendant and cross-claimant, Margaret Morton, forthwith, the amounts hereinabove recited as due, together with interest thereon from September 9, 1963 until paid, together with all costs of this suit taxed by the Clerk of this Court, Sheriff's fees, costs of publication, Special Master's fees, and all other costs of these proceedings.

(d) In default of said payment being made as hereinabove ordered, then the said undivided 8% interest in the above described property lying and being in Dade County, Florida, be sold at public auction for cash to the highest and best bidder at the south door of the County Courthouse in the City of Miami, Dade County, Florida, to satisfy this decree. Honorable Jack Abbott, Esquire, be and he is hereby designated and appointed as a Special Master of this Court to make and conduct said sale on a legal sale day during the legal hours of sale after first giving public notice of sale, time and place thereof, and causing said notice to be published once a week for four consecutive weeks in The Miami Review, a newspaper of general circulation published in Dade County, Florida, and he is hereby authorized and directed to execute and carry into effect this decree.

(e) Out of the proceeds arising from the sale of the property herein ordered to be sold, the Master shall retain his fee and shall pay to the officials of the Court their costs herein, and shall pay to the attorneys for the cross-claimant, Margaret Morton, any attorneys' fees that may be hereinafter allowed in this cause; out of the remainder of said proceeds, as far as the same shall apply, there shall be paid to the cross-claimant, Margaret Morton, the sum of $233,799.87, with interest thereon from September 9, 1963 to the date of sale. If said property shall sell for more than enough to pay the cross-claimant the aforesaid sum now due to her with interest thereon, said Master shall report said overplus to this Court for this Court's order and the same shall thereupon be deposited in the Registry of the Clerk of this Court to be held as security for the balance due the cross-claimant, Margaret Morton, as hereinabove adjudicated.

(f) The plaintiff, Wheatland Hills Corp., and cross-defendants, Richard Morton and Emil Morton, and all persons claiming by, through or under them since the commencement of this suit, shall be forever barred and foreclosed of any and all right, equity of

redemption, claim, estate, or title in and to the above described property.

(g) Upon the execution and delivery of the Master's Deed to the purchaser at said sale, or his or its heirs, representatives, successors or assigns, he, it or they shall, without delay, be let into possession of the said premises so conveyed.

(h) The cross-claimant, Margaret Morton, shall be permitted to bid at the said Master's sale the total amount of the award made to her and in the event she is the successful bidder, she shall only be required to pay the costs of court and Master's fee, the balance to be credited against the amount due or awarded to her as above set forth.

(i) The Court retains jurisdiction of this cause to render such orders and decrees as may be necessary to enforce the terms and conditions of this Corrective Final Decree.

DONE AND ORDERED in Chambers, at the Dade County Courthouse, Miami, Florida, this 19 day of April, 1966.

/s/ William A. Herin
CIRCUIT JUDGE"

A timely appeal was duly instituted and perfected in the District Court of Appeal, in and for the Third District of Florida. On May 9, 1967, the decision sought to be reviewed in this proceeding was entered and filed. The short per curiam opinion of the District Court of Appeal reads as follows (R 438):

"PER CURIAM.

The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be subjected to the satisfaction of the claim for alimony and child support. Having been

shown no reversible error, the decree appealed is affirmed. State of Florida v. Jacksonville P. & M. R. R. Co., 16 Fla. 708, 722 (1878); Klausner v. Ader, Fla. App. 1963, 156 So. 2d 193; Webb v. Webb, Fla. App. 1963, 156 So. 2d 698; Wesner v. O'Brien, 56 Kan. 724, 44 P. 1090 (1896); Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569 (1900); Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684. See Wagner v. Wagner, 293 F. 2d 533, 538 note 5 (D.C. Cir. 1961); Annotations 10 A.L.R. 3d 212.

Affirmed."

Pursuant to the definition of the term "Rendition" contained in Florida Appellate Rule 1.3 (Appendix, p. A1), the decision sought to be reviewed became final on June 13, 1967. On that date the timely petition for rehearing that had been filed was denied and the mandate issued (R 439). The period of ninety days from the date of the rendition of the decision sought to be reviewed expired on Monday, September 11, 1967. The petition for a writ of certiorari was not filed in this cause in the Supreme Court of the United States until January 3, 1968.

In the interim (between the time the decision sought to be reviewed became final and the petition for a writ of certiorari was filed in this Court) the petitioner sought review in the Florida Supreme Court by the filing of a petition for a writ of certiorari. The Florida Supreme Court did not have jurisdiction of this case pursuant to the grant of jurisdiction contained in Article V, Section 4(2) of the Florida Constitution (Appendix, p. A1). The Florida Supreme Court so stated in its order denying the petitioner's application for a writ of certiorari (R 451). Consequently the highest court in the State of Florida empowered to render a decision in this case was the District Court of Appeal, in and for the Third District. That Court rendered its decision which is sought to be reviewed and that decision became final more than ninety days prior to the institution of this proceeding.

QUESTION PRESENTED

Petitioner, in the "Question Presented" section of its brief (pp. 2-3) has predicated the issue on the following mistaken conclusions:

(1) That there was no seizure or sequestration of Richard Morton's property located in Florida prior to the entry of the quasi in rem alimony and child support decree.

(2) That the process was legally inadequate.

Additionally as underlying assumptions the petitioner has overlooked the following:

(3) That Wheatland Hills Corp., a Delaware corporation, adjudicated to be a fraudulent device concocted by Richard Morton and his family, has no standing to assert an alleged violation of Richard Morton's constitutional right to due process of law.

(4) That there has been no denial of due process of law because the alimony proceeding in Florida was quasi in rem, and no attempt has ever been made to impose any personal obligation upon Richard Morton. His property in Florida has been seized by legal process to satisfy his wife's and children's claims for alimony, child support, suit money and attorney's fees. The state courts have not attempted to exercise any jurisdiction beyond the extent of Richard Morton's property in Florida.

These mistaken assumptions, indulged in by the petitioner, make it impossible for the respondent to accept the petitioner's statement of the issue. The respondent earnestly believes that the issues may be accurately phrased in accordance with the record as follows:

(a) Whether or not Richard Morton was denied due process of law by virtue of the rendition of a final decree of divorce against him providing for the payment of alimony, child support, suit money and attorney's fees which was founded upon constructive service of process but which did not attempt to impose a personal obligation upon him and constituted an exercise of jurisdiction solely to the extent of property located in the State of Florida which had been seized by due and lawful process?

(b) Whether or not Wheatland Hills Corp. can assert an alleged violation of Richard Morton's constitutional right to due process of law?

(c) Whether or not a decision of the alleged constitutional issue was necessary and unavoidable to a determination of the rights of the parties to this litigation?

(d) Whether or not this Court has jurisdiction, since the petition for a writ of certiorari was filed out of season and was untimely by virtue of the elapse of 204 days between the date of the finality of the decision sought to be reviewed and the filing of the petition in this cause?

ARGUMENT

A) Richard Morton Was Not Denied Due Process of Law by Virtue of the Rendition of a Final Decree of Divorce Against Him Providing for the Payment of Alimony, Child Support, Suit Money and Attorney's Fees Founded upon Constructive Service of Process But Which Did Not Impose Any Personal Obligation upon Him and Constituted an Exercise of State Jurisdiction Solely to the Extent of His Property Located in the State of Florida Which Had Been Seized by Due and Lawful Process

Under settled constitutional concepts, in marital litigation, a domiciliary state has the power, upon constructive

service of process, to terminate the marital statuus and if that state is the domicile of the wife and the husband has property in the state, the state has the added power to apply the husband's property to the satisfaction of the claim for alimony and child support in order to prevent an abandoned spouse and children from being left impoverished and becoming a public charge. See: *Estin* v. *Estin,* 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong,* 350 U.S. 568, 76 S. Ct. 629; *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, 77 S. Ct. 1360.

Proper perspective requires that it be noted that civilized society requires of a husband and father that measure known as alimony and child support for the maintenance, upkeep and preservation of his family. This principle is embossed in the law of Florida by the opinion of Justice Terrell in *Pollack* v. *Pollack,* 159 Fla. 254, 31 So. 2d 253, 254, where, speaking for the Florida Supreme Court, he wrote:

> "Appellant fails to take account of the well-settled principle that the law imposes on civilized man the duty to provide food, shelter and raiment for his own. It was one of the conditions upon which Adam was bounced out of the garden, and it has been the law ever since. Courts of equity have inherent jurisdiction to protect infants. *Fisher* v. *Guidy,* 106 Fla. 94, 142 So. 818. They are wards of the Court and when the Chancellor is concerned with their bread and butter, he does not take his cue from Elijah and the ravens, he draws it from the earnings of the father. . . ."

Richard Morton is an immensely wealthy man. His wife and his children have gone without since he abandoned them in April 1962. Their food, shelter and clothing should be drawn from him, and that is precisely what the Sarasota Circuit Court did. The jurisdictional argu-

ment, based on an alleged denial of Richard Morton's constitutional right to due process of law, is asserted in this litigation by Wheatland Hills Corp., a Delaware corporation, the corporate device created by Richard Morton and the Morton dynasty, to deprive Richard Morton's wife and children of their just due. The argument made by that instrumentality in this Court is that there was no legally recognized seizure of Richard Morton's title and ownership in the Morton Towers property prior to the conveyance to Wheatland Hills Corp. The Courts of Florida have determined that a duly issued notice of suit that specifically describes real property located in the State of Florida is tantamount to and the equivalent of an equitable sequestration. The decision which established that as the law of Florida is *Webb* v. *Webb*, 156 So. 2d 698 (Fla. App. 3rd, 1963). The analysis of that question was made by Justice Barnes, and since the writers of this brief cannot improve upon that exposition of the law, the opinion is quoted in full, as follows (156 So. 2d at 700-703):

> "*Jurisdiction on constructive service in suit against non-resident for divorce or alimony to reach his property within the state.*
>
> As Mr. Justice Field stated in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, 'Every state owes protection to its own citizens; and when non-residents deal with them, it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property;', and the decision further held that when the court did not acquire jurisdiction

over the person of the defendant-owner that 'the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property', and 'that substituted services by publication, or any other authorized form, may be sufficient to inform the parties of the object of the proceedings taken where property is once brought under control of the court by seizure or some equivalent act.' The property must be proceeded against or subjected to the process of the court *in limine*.

In Pennington v. Fourth National Bank, 243 U.S. 269, 37 S.Ct. 282, 283, 61 L.Ed. 713, it was held that an injunction restraining a bank [joined as a defendant] from paying out any part of a deposit standing in the name of the husband was as effective as a seizure to make the action one quasi in rem, where the complaint sought a divorce and alimony and the non-resident husband was not served within the state and did not appear; and that it was 'immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court'.

The foregoing Pennington case was a review of the decision reported in 92 Ohio St. 517, 112 N.E. 1085. The Ohio decision was a memorandum decision without an opinion, but cited as authority Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569. As to the divorce action of Pennington v. Pennington (not reported and in which action the injunction in rem was issued) we are not advised whether the notice to the non-resident husband gave notice of the proposed appropriation of his property, as required in Pennoyer v. Neff, supra. However, we assume that the Ohio law required such notice and that its law was complied with, by reason of the following language in Benner v. Benner, supra:

> '* * * The judgment rendered was made operative only on the property so brought within the control of the court at the beginning of the suit,

and is not, in our opinion, void for want of jurisdiction. In Wesner v. O'Brien, 56 Kan. 724, 44 P. 1090 [32 L.R.A. 289], the court went further, and sustained a judgment, rendered on constructive service, which appropriated land in that state, of a non-resident defendant, for his wife's alimony, though the land was not situated in the county where the suit was brought, and no step was taken to bring the property within the control of the court, otherwise than by the commencement of the suit and publication of the notice. The court said that the "seizure of the land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice, which *warns the defendant that one of the purposes of the proceeding is the sequestration of the land.*" * * *' [Emphasis added]

Forrester v. Forrester, 155 Ga. 722, 118 S.E. 373, 29 A.L.R. 1363, was an action for permanent alimony and attorney's fees against a non-resident defendant, over whom the court did not obtain personal jurisdiction. The case held that the lower court, by reason of its general jurisdiction in equity, could appropriate a debt owing to the non-resident husband when the debtor was made a defendant in the action and was personally served with process, stating:

'* * * At common law as well as the statute of this state, a husband is bound to maintain and support his wife. Whatever sum may be necessary for that purpose is a demand which, when liquidated by the court by a judgment fixing its amount in such sum as may appear to the court to be just and adequate, is called alimony. Her husband, the debtor, after abandoning her, takes up his residence in the state of Alabama. A citizen of this state, who resides in Worth County, owes the non-resident a debt of $600, besides interest. Is the

plaintiff in such a case remediless to enforce her legal demand for support, merely because this demand is for support, otherwise called alimony, instead of being a claim of some other nature? If the plaintiff in the present case, instead of being the wife of her non-resident debtor, were any other person to whom he was indebted, could she not enforce her demand by an attachment based upon non-residence and perfect service by summons of garnishment upon the debtor of the non-resident? We apprehend that there can be but one answer to this question.

'Aside from the fact that the demand for alimony cannot be enforced by attachment and garnishment, because this is a proceeding in law, is the fact that a demand for alimony is unliquidated and must remain unliquidated until fixed by a decree of the court, and this itself would absolutely preclude the plaintiff in the suit for alimony against a non-resident from proceeding by attachment. At law this plaintiff is remediless; and, in such a case, and whenever and wherever the law by reason of its universality is impotent to succor one who has a right, equity supplies the needful remedy. Whether the use of the term "equitable attachment" be appropriate or not, it is our opinion that equity, by a proceeding in rem and the seizure and appropriation of the res, can condemn all or so much of the res as is necessary for that purpose to the just demands of a citizen of this state, when the res, the property of the non-resident, is located in this state. It is true that our laws have no extraterritorial effect, and it may be true that in a particular case personal service cannot be perfected other than by publication; but the courts here still have jurisdiction of the subject-matter of the suit and of the res, and can apply the one to the other by a judgment in rem, as suggested by Chief Justice Fish in Hood v. Hood, 130 Ga. 610, 61 S.E. 471, 19 L.R.A. (N.S.) 193, 14 Ann. Cas. 359. * * *'

Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684, 64 A.L.R. 1384, was an action for divorce and seeking the appropriation of defendant's interest in land [held by the husband and wife jointly] to satisfy alimony. The husband was a non-resident, over whom the court did not obtain personal jurisdiction. The court held that since the petition and the published notice to the defendant-husband contained a particular description of the land sought to be appropriated, that the proceedings were equal to a sequestration of the land:

> '* * * We think the first proposition is decided in favor of the plaintiff by the case of Wesner v. O'Brien, supra, cited and relied upon by this court in the Benner case. In that controversy, the contention was squarely made that the property in question had not been brought within the control of the court by attachment or any similar proceeding. The court held that, where a petition asks to have specific land appropriated as alimony and the publication notice contains a particular description of the land sought to be appropriated and the nature of the relief demanded, this constitutes a sequestration of the property and gives the court jurisdiction to dispose thereof upon final decree. The court points out that it is not necessary, in order to bring the property under control of the court, that it should be actually taken in attachment or by other writ, and states that any authorized act by which the court takes charge of property or asserts its control over it is sufficient for purposes of jurisdiction.' * * *

Geary v. Geary, 272 N.Y. 390, 6 N.E.2d 67, 108 A.L.R. 1293, was an action for separation and alimony against a non-resident husband, over whom the court did not obtain personal jurisdiction. The lower court appointed a receiver for the husband's property. The receiver was ordered to pay for the support of the wife. The opinion states:

"* * * Without service of process within the state or voluntary appearance in court or submission to its jurisdiction, no court of a state acquires jurisdiction of the person of a non-resident defendant or can grant a personal judgment enforceable by execution against his person or property. Though a state has power to provide that the property of a non-resident within the state may be applied to satisfy the obligation of a non-resident, it may do so only where the action is directed against property which the court has taken into its custody or possession and where the defendant who owns the property has actual or constructive notice of the action and has opportunity to defend. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

* * * * * *

'In this case, though the defendant was served personally in California under a valid order of the court, and failed to appear or plead in the action, the judgment which could be granted upon default could not include an effective award of alimony payable out of sequestrated property of the defendant which had not previously been seized. "The right to dispose of it rests upon a prior seizure. Only so does the defendant receive notice that he has rights which should be protected. It must, therefore, appear *before a judgment* is entered purporting to deal with a non-resident's property, that by attachment, by injunction, by sequestration, in some manner, the court has laid hands upon his property within the State." (Italics are mine.) Matthews v. Matthews (second appeal), 247 N.Y. 32, 34, 159 N.E. 713, 714, per Andrews, J.

* * * * * *

'The jurisdiction of the court over the *marital status* of the parties did not depend upon the sequestration or seizure of the defendant's property. It had such jurisdiction before. That jurisdiction did not, however, extend further to the disposition of

any property which might be thereafter seized. That can rest only upon prior seizure. We are not here concerned with the validity of any orders for alimony pendente lite. The order which we are reviewing applies only to alimony granted by the judgment. Since the judgment was granted after seizure in this case, and since the defendant had notice that his property was seized and would be applied in satisfaction of any award of alimony made against him, and since the defendant had opportunity to contest the right to seizure of his property and to its application upon any judgment that might be entered, and chose to disregard the notice, he should not be heard to complain that his property had been taken without due process of law. The rule, if there be such rule, that seizure must precede *assumption of jurisdiction* by the court in the action, applies only to assumption of jurisdiction to adjudicate in the action upon rights in the defendant's property. The New York statute in terms permits the making of a sequestration order in a pending action. The Constitution of the State of New York and the Constitution of the United States are not violated by such provision so long as under the New York statute seizure must precede inquiry or adjudication as to the award of alimony, or the application of property of the defendant to payment of such award so that the defendant may have opportunity to be heard upon that inquiry. The defendant has had such opportunity here.' [Emphasis by the court]"

The petitioner contends that *Webb* v. *Webb*, supra, is in conflict with this Court's decision in *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565. *Pennoyer* v. *Neff*, supra, was a case brought in Oregon to recover possession of a tract of land in Oregon that had been sold to Neff upon execution sale by the Sheriff pursuant to a judgment that had been rendered against Pennoyer. The judgment against Pennoyer was entered in a common law action in which

Pennoyer had not been personally served and did not personally appear. No property was attached or proceeded against until after rendition of the judgment. This Court held that judgment void and set aside the sale. Mr. Justice Field, writing the opinion for the Court, made it extremely clear that where one of the objects of the action was to proceed against a particular piece of property and to reach and apply an interest in that property, the state had the power to do so on the predicate of constructive service of process. Pertinent excerpts from the opinion read thusly:

(95 U.S. at 727)

"Substituted services by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. . . ."

(95 U.S. at 730-731)

"* * * In all the cases brought in the State and Federal Courts, where attempts have been made, under the Act of Congress, to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form,

> it has been held, without an exception so far as we are aware, that such judgments were without any binding force, except as to property or interests in property within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. . . ."

Supporting that view, Mr. Justice Field quoted from an earlier United States Supreme Court decision by Mr. Justice McLean, as follows (95 U.S. at 724):

> "Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

Mr. Justice Field, in concluding his decision in *Pennoyer* v. *Neff*, supra, takes great pains to point out that the opinion is not to be misconstrued as a curtailment of the power of the several states to proceed upon the foundation of constructive service of process, in matters effecting the status of residents, and the disposition of property within the borders of the state. He limited the application of the opinion as follows (95 U.S. at 736):

> "* * * The question here respects only the validity of a money judgment rendered in one State, in an

action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."

Subsequent to the decision of *Pennoyer* v. *Neff*, supra, the United States Supreme Court, through Mr. Justice Brandeis, in *Pennington* v. *Fourth National Bank of Cincinnati, Ohio*, 243 U.S. 269, 37 S. Ct. 282, 283, held:

> "It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. *It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin.
>
> The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction

which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law. . . ."

Reading the Pennoyer, Pennington and Webb cases together establishes that in marital litigation a wife may proceed against her husband's property within the state in order to subject it to the satisfaction of such alimony, child support, attorney's fees and suit money as the divorce court may ultimately grant. The proceeding against the property is in rem and the divorce court's jurisdiction extends solely to the limit of the property within the state. The power of the Court is based upon its seizure of the property by lawful process prior to the rendition of the decree for alimony, child support, attorney's fees and suit money. A notice of suit duly issued specifically describing the nonresident husband's property within the state as property proceeded against and sought to be subjected to the lien of the decree to be rendered in favor of the wife and children constitutes a seizure and makes the proceeding one in rem against such duly described property. In this case all of the essentials were complied with. Mrs. Morton and her children duly notified Richard Morton on September 21, 1962, that his title and ownership in the Morton Towers property in Dade County, Florida, and in the marital residence in Sarasota County, Florida, were being proceeded against in order to be subjected to the claims for alimony, child support, attorney's fees and suit money. That seizure took place long before the entry of the final decree rendered on September 9, 1963, imposing an equitable lien upon Richard Morton's eight (8%) percent title and ownership in the Morton Towers property for the satisfaction of the decreed alimony, child support, attorney's fees and suit money. Richard Morton had actual

notice and had an opportunity to defend. As the above cited law required, Richard Morton should have come forth and established such defences as he deemed he had. Richard Morton never utilized the opportunity afforded him to contest the Sarasota Circuit Court's jurisdiction either in that Court or on appeal. Instead, Richard Morton chose to utilize the opportunity to defend as an opportunity to defraud. He did not ignore the Florida divorce proceedings. Upon actual notice he, in conjunction with his dynastic family, galvanized themselves into action in an attempt to destroy the Sarasota Circuit Court's jurisdiction over his property and in that way hoped to prevent the Courts of Florida from providing for its citizens. As established by the cited cases, the Sarasota Circuit Court undeniably had jurisdiction to the extent of Richard Morton's property in Florida. If Richard Morton and his family could convert that property in Florida into a different form of property with existence outside of Florida, then the goal of destroying the Sarasota Circuit Court's jurisdiction might have been accomplished. The clever method selected was to convert Richard Morton's title and ownership in the Morton Towers real property in Florida into an ownership of intangible property in the form of corporate stock in a foreign corporation, with its situs beyond the reach of the Florida judiciary. That is precisely why Wheatland Hills Corp. was created as a Delaware corporation and the stock certificates retained by Lawrence Morton in New York under a voting trust (Stipulated Exhibit C; R 319). Consequently, a seemingly naive argument that there is nothing wrong in converting Richard Morton's ownership of land in Florida to stock in a foreign corporation is spurious, because in that conversion lies the attempt at destruction of the Sarasota Circuit Court's jurisdiction. The Sarasota Circuit Court had jurisdiction of the land in Florida but it did not have and could not acquire jurisdiction

over the stock of a Delaware corporation physically located in New York. The due process concepts espoused by this Court were patently meant to protect persons from having their property taken without notice and without a chance to present their case. Those concepts were never intended to grant sanctuary to a person who knows of the proceeding and who has a chance to defend but who prefers to perpetrate a fraud and accomplish the impoverishment of his wife and children. Clearly Richard Morton's constitutional right to due process of law was fully honored.

B) Wheatland Hills Corp. Cannot Assert the Alleged Violation of Richard Morton's Constitutional Right to Due Process of Law; and

C) The Decision of the Alleged Constitutional Issue Is Not Necessary and Unavoidable to a Determination of the Rights of the Parties to This Litigation.

These two issues shall be presented together because they are inseparably interrelated. Traditionally established practice in the United States Supreme Court precludes consideration of constitutional questions raised by a litigant for someone else and where a determination of the constitutional question is avoidable. See as exemplary *Blair* v. *United States,* 250 U.S. 273, 39 S. Ct. 468; *Voelier* v. *Neilston Warehouse Co.,* 311 U.S. 531, 61 S. Ct. 376; and *Neese* v. *Southern Railway Company,* 350 U.S. 77, 76 S. Ct. 131. In Blair it was held:

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

Similarly, in Voeller, the following was stated:

> "The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions."

In Neese, this Court held:

> ". . . we follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties."

In this case the petitioner, Wheatland Hills Corp., is asserting as a constitutional question an alleged violation of Richard Morton's right to due process of law. It is apparent the corporate instrumentality asserting the issue does not have standing.

Under settled law in Florida a collateral attack upon a final decree of divorce is permitted only by the immediate parties to the litigation upon the grounds of extrinsic fraud. In other words once the appeal period has expired, a final decree becomes unassailable except for matters that are extrinsic to the original litigation and which could not have been litigated in the original proceeding. See as exemplary: *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801; *Matsis* v. *Matsis*, 155 Fla. 786, 21 So. 2d 545; *Masilotti* v. *Masilotti*, 158 Fla. 663, 29 So. 2d 872; and *MacFadden* v. *Muckerman*, 116 So. 2d 448, Fla. App. 3rd, 1959. Furthermore, it is settled as a matter of Florida law that strangers to a final decree can seek to impeach it only as such decree affects their rights which they pos-

sessed prior to its rendition. See *DeMarigny* v. *DeMarigny*, 43 So. 2d 442 (Fla. 1949); *Gaylord* v. *Gaylord*, 45 So. 2d 507 (Fla. 1950); and *Tallentire* v. *Burkhart*, 153 Fla. 278, 14 So. 2d 395. In the last cited case, Mrs. Burkhart sought to enforce a quasi in rem alimony decree against property that she claimed belonged to her absent husband. Those against whom Mrs. Burkhart sought to enforce her final decree contended that the final decree in the main proceeding should be set aside on the ground of want of jurisdiction over the person of the defendant, the same contention made by Wheatland Hills in this case. The Florida Supreme Court held that those strangers to the final decree in the main proceeding had limited standing solely to resist the attempt to enforce the decree against their property but not otherwise because the decree in no way injuriously affected them. That simply means that all that strangers to the decree could do was demonstrate that they in fact were bona fide owners of the property Mrs. Burkhart sought to have subjected to the satisfaction of her final decree against Mr. Burkhart. Obviously if they were bona fide owners of the property, Mrs. Burkhart could not take a stranger's property in satisfaction of her husband's debt. The pertinent language of that holding reads as follows (14 So. 2d at 397):

> "The petitioners are strangers to the main suit. They were originally allowed to come in as intervenors after final decree, only because by subsequent motion in the cause Mrs. Burkhart sought to impound certain property claimed by them to the satisfaction of the judgment against her former husband. To the extent that it was necessary for them to be given an opportunity to defend such rights as they had against the threatened action of Mrs. Burkhart, they had sufficient standing in court to entitle them to resist any attempt upon her part to enforce the judgment

against their property. Tallentire v. Burkhart, supra; Freeman on Judgments, 5th Ed., Sec. 310, p. 623. But otherwise, they cannot be heard to question the decree rendered in the main proceeding (as they now are attempting to do) because it cannot be said that they are injuriously affected thereby."

Similarly, in the case at bar, Wheatland Hills Corp., a Delaware corporation, is a stranger to the Sarasota divorce proceeding although not an innocent party without full notice and knowledge of that proceeding. Its standing is strictly limited by state law to demonstrate, if it could, which of course it could not and did not, that it was a bona fide purchaser of the Morton Towers property without either constructive or actual knowledge of the Sarasota divorce proceeding. It was in no position to collaterally attack the jurisdiction of the Sarasota Circuit Court in the Dade County Circuit Court on the ground of lack of personal jurisdiction over Richard Morton. Richard Morton could not make that attack since he had actual notice and declined the opportunity to defend that was afforded to him, and the final decree has passed into repose by the elapse of the appeal period. The Gaylord case, supra, is significant because it establishes the doctrine of quasi estoppel in collateral attacks on final decrees by strangers who have actual knowledge of the pendency of the proceeding leading up to the rendition of the challenged decree. The Florida Supreme Court adopted the quasi estoppel doctrine as a part of Florida law, because to permit strangers having actual knowledge of the pendency of litigation to collaterally attack the resulting decree would be an invitation to flagrant attempts to circumvent the law. The pertinent language of the Gaylord decision reads as follows (45 So. 2d 509):

"It is true that the respondent was not actually a party to the alleged invalid divorce. Consequently,

> he was, in the strict legal signification of the word, a 'stranger'. However, he was not a stranger in the sense that he was ignorant of or unfamiliar with the Alabama divorce suit for he was appointed Commissioner by the Alabama court and acted as such in the State of New York in taking the deposition of the plaintiff (petitioner here) which fact, although it may not create a true estoppel, gives birth to a 'quasi estoppel' and is a circumstance which cannot be entirely ignored. Our decision in the instant suit is not founded upon this incident but we do approve the pertinent observation which was made in Harlan v. Harlan, 1945, 70 Cal. App. 2d 657, 161 P. 2d 490: 'To hold otherwise protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt to circumvent the law,' . . ."

The "quasi estoppel" doctrine thus established in Gaylord, supra, is poignantly applicable to this litigation. Wheatland Hills Corp., a Delaware corporation, is a stranger to the Sarasota Circuit Court final decree of divorce between the Mortons, but as in Gaylord it was not a stranger in the sense that it was ignorant of or unfamiliar with the Sarasota divorce proceedings. It acquired its interest in the Morton Towers property not only in the light of the Sarasota Circuit Court divorce proceedings but as Mr. Newman (one of the older generation in the Morton dynasty) testified for the avowed purpose of trying to thwart that Court's jurisdiction. Wheatland Hills Corp. came before a court of equity with dirty hands indeed and lacked standing and was barred from making the collateral attack (unmeritorious though it may be) that it presented. Additionally, under established state law, Wheatland Hills was not a bona fide purchaser. The indicia or badges of fraud in Florida are clearly codified in 15 Fla. Jur., *Fraudulent Conveyances*, Section 12, at pages 43-44, as follows:

> "* * * The facts that are recognized indicia of fraud are numerous, the most important being the insolvency or indebtedness of the transferor, the transfer of the debtor's entire estate, relationship between the transferor and the transferee, lack of consideration for the conveyance, retention by the debtor of possession of property transferred accompanied with the exercise of unequivocal acts of ownership over it, the reservation of benefit to the transferor, and the pendency or threat of litigation. Other recognized indicia of fraud include * * * the withholding of a deed of transfer from the record for a period of time, the transfer of the debtor's assets to a corporation owned or controlled by him, . . ."

The decided cases in this area are legion but some of special significance shall be considered. In *Bloxham* v. *Florida Cent. & P. R. Co.*, 35 Fla. 625, 17 So. 902, and *J. I. Kelley Co.* v. *Pollack & Bernheimer*, 57 Fla. 459, 49 So. 934, the Florida Supreme Court held that real property transferred to a newly formed corporation, in exchange for corporate stock, remains subject to existing debts and equitable claims and that such corporation is not an innocent purchaser. In *Bloxham*, supra, at a time when ad valorem taxes in Florida did not constitute a lien against real property but were merely a simple debt, the owners of property subject to delinquent taxes formed corporations and transferred their property to it in exchange for the corporation's stock. Just exactly what RICHARD MORTON did in exchanging his title and ownership in the MORTON TOWERS property for stock in WHEATLAND HILLS CORP. The Florida Supreme Court condemned that type of transaction as non bona fide in these words. (17 So. at 922):

> "* * * Therefore the inquiry arises whether the Florida Railway & Navigation Company was such innocent purchaser as we have hereinbefore stated could hold

the property as against the state's claim for taxes. The only changes which had occurred in the ownership of the property between the time of its acquisition by Reed and his associates in September, 1879, and its assessment for taxation, were by a sale by the persons organizing a corporation to the corporation composed of themselves, and by a consolidation of the corporation owning it into another corporation, of which it remained a constituent part until the assessments were made. It would be defeating the state of its taxes upon the merest technicality to hold that such transfers of the property as these constituted an innocent purchaser, as the transferees, Reed and his associates, came into the ownership of the property in September, 1879. At this date the time, under the then existing laws, had not expired when the state might assess and collect the taxes from the property. Laws 1879, pp. 30, 31, c. 3099, §§ 45, 46. They took the property when it was liable to taxation for 1879, and held it while it became and was liable for the taxes of 1880 and 1881. These taxes, while not liens upon the property, were obligations due by the owners, and for which the property might be made liable. Can this obligation and liability be discharged by the transfer of the property by the owners as individuals to themselves in a corporate capacity? We think not. Such transfers are more nominal than real. In the case of Railroad Co. v. Drew, 3 Woods, 691, text 701, Fed.Cas. No. 17,434, a question somewhat similar arose, in which it was determined that, where persons holding as individuals railroad property subject to a lien passed the title to a corporation composed of themselves clothed with corporate power, the lien was not thereby divested. 1 Mor. Priv. Corp., § 229, thus states the same principle: 'If an association of persons owning property subject to equitable claims obtains an act of incorporation, the property will remain subject to these claims after it is vested in the corporate name. * * *' To similar effect, also, is Beach, Priv. Corp. § 797. We have not been able to find a case where the precise

question herein involved (i.e. the liability for taxes of property transferred by an association of persons to themselves as a corporation) has been adjudicated. We find a number of cases where it has been held that such a transfer would not relieve the property of liability for an indebtedness contracted by the association which afterwards became a corporation. The case of Hancock v. Holbrook, 40 La.Ann. 53, 3 South. 351, was a case where the stockholders of a corporation, through the medium of an individual who was not a stockholder, bought property at a judicial sale in the name of the corporation, and immediately conveyed the same to a new corporation, composed of the same stockholders and the individual through whom the property was purchased. The court (text, page 61, 40 La.Ann., page 351, 3 South.), speaking upon the contention that the property in the hands of the new corporation was not liable for the debts of the company, says: 'The new corporation was simply the Herald Company plus Holbrook, as evidenced by the glaring fact that its stock, except that assigned to Holbrook, was distributed without other consideration among the Herald stockholders in exact proportion to their stock therein. The proposition that the stockholders of a corporation can buy property in its name on credit, immediately thereafter form a new corporation, in which their interests are the same, and based on no new consideration, transfer the property bought to the new corporation, and then hold it free from any liability to the vendor or creditors, is one which cannot be sustained in reason or by authority.' . . ."

In *Frell* v. *Frell,* 154 So. 2d 706 (Fla.App.3rd, 1963), a conveyance to a defendant-husband's brother and his wife to hinder, delay and defeat the plaintiff-wife's right to collect alimony was set aside as a fraud. The court held (154 So. 2d at 708-709):

"* * * However, where the parties involved in the alleged fraudulent transaction are relatives or close associates of the transferor, such close relationship

> tends to establish a prima facie case which must be met by evidence on the part of the defendant, and such transactions are regarded with suspicion. Southern Lumber & Supply Co. v. Verdier, 1906, 51 Fla. 570, 40 So. 676; Reel v. Livingston, 1894, 34 Fla. 377, 16 So. 284; Harkins v. Holt, 1936, 124 Fla. 774, 169 So. 481."

Regarding burden of proof, it has been long settled that the existence of a badge of fraud casts the burden of proof to explain the transaction upon the transferee. In *Money* v. *Powell*, 139 So. 2d 702, 703-704 (Fla.App.2nd, 1962), it was held:

> "Moreover, where the transferee in an alleged fraudulent transaction is a relative or close associate of the transferor, such tends to establish a prima facie case which must be met by evidence on the part of the defendant. Tornwall v. Carter, supra; Southern Lumber & Supply Co. v. Verdier, 1906, 51 Fla. 570, 40 So. 676; Harkins v. Holt, 1936, 124 Fla. 774, 169 So. 481."

Similarly, in *Folsom* v. *Farmers Bank of Vero Beach*, 102 Fla. 899, 136 So. 524, 527, the Florida Supreme Court held:

> "The general rule is that a deed with a consideration merely nominal will be considered voluntary as against attacking creditors. * * *
>
> "Voluntary conveyances by debtors of their real estate are not absolutely fraudulent per se, but are prima facie or presumptive evidence of fraud, which may be rebutted or explained; and the burden of proof to show that the deed was not fraudulent falls upon those claiming under it."

In this case, almost every badge of fraud exists. RICHARD MORTON, at the time of the purported conveyance to WHEATLAND HILLS CORP., was indebted to his wife and children for alimony, child support, attorneys' fees and court costs. He and his family were on notice of the di-

vorce proceeding and that one of its objects was to appropriate his interest in the MORTON TOWERS property to the satisfaction of the stated debts. WHEATLAND HILLS CORP. was not an innocent purchaser for value by the exchange of stock for title to real estate. RICHARD MORTON retained all of the benefits of ownership, exemplary of which is the increase of his personal loan at THE CHASE MANHATTAN BANK and the application thereafter of the rents and profits from the MORTON TOWERS property to pay that debt as if WHEATLAND HILLS CORP. did not exist. Possession remained as it always had been, in EMIL MORTON, the uncle of RICHARD MORTON. In fact, nothing was altered by the attempt to change the form of ownership. As the cited authorities establish, the conveyance to WHEATLAND HILLS CORP. was a fraud, which, in equity, had to be disregarded as though it never occurred. WHEATLAND HILLS CORP. failed to even attempt to meet its burden of proof by explaining away the established presumptive fraud.

It is readily apparent that Wheatland Hills has no standing before this Court to assert an alleged violation of Richard Morton's right to due process of law. As demonstrated in the preceding section of this brief, Richard Morton was not denied due process of law. The constitutional question attempted to be asserted by Wheatland Hills was not unavoidable and was not necessary for a determination of the rights of the parties to this litigation. Pursuant to state law, a collateral attack is limited to a demonstration of extrinsic fraud in the procurement of the assailed decree. The record is utterly devoid of any such proof. Moreover, Wheatland Hills as a stranger to the decree was both precluded and estopped by state law from making the attack that it sought to present. It was precluded from challenging the original divorce proceeding

and it was not a bona fide owner of property seeking to protect its rights. It was estopped by its guilty knowledge of the original proceeding and its fraudulent activity. Under the customary and established practice of this Court, Wheatland Hills ought not be permitted to proceed further and its petition for a writ of certiorari should be denied.

D) The United States Supreme Court Does Not Have Jurisdiction Because the Petition for a Writ of Certiorari Was Filed Out of Season and Was Untimely by Virtue of the Elapse of 204 Days Between the Date of the Finality of the Decision Sought to Be Reviewed and the Filing of the Petition in This Cause.

The petitioner has invoked the jurisdiction of this Court allegedly under the auspices of 28 U.S.C., Section 1257(3). That jurisdictional statute permits the United States Supreme Court to review final judgments or decrees rendered "by the highest court of a state in which a decision could be had." The time for applying for a writ of certiorari in this Court from a final judgment or decree of a state court is prescribed by Congress in 28 U.S.C., Section 2101(c). It is provided that the writ shall be "applied for within 90 days after the entry of such judgment or decree." That section also provides that a Justice of the Supreme Court for good cause may extend the time for a period not exceeding 60 days. Supreme Court Rule 34(2) expressly declares that extensions of time to file petitions for certiorari must be submitted at least 10 days prior to the expiration of the period sought to be extended and will only be granted in extraordinary circumstances if filed during the last 10 days of such period. It is apparent that in promulgating the cited rule, this Court declared the policy that the 90 day allowable period for the timely presentation of petitions for certiorari will be scrupulously observed. Moreover, Congress, in the cited Act, provided that petitions for certiorari could under no circumstances

be filed more than 150 days after the rendition of the final judgment or decree of a state court.

In the instant case the petition for certiorari was filed on January 3, 1968. The decision of the District Court of Appeal, Third District of Florida, sought to be reviewed was rendered and became final on June 13, 1967. The reason that date marks the finality of the decision sought to be reviewed is because that was the day that the District Court of Appeal denied petition for rehearing and its mandate issued (R 439). Rendition is defined by Florida Appellate Rule 1.3 (Appendix, p. A1). The intervening period between the finality of the decision sought to be reviewed and the filing of the petition for certiorari in this Court was 204 days. Under no circumstances could that period be considered seasonable even if applications had been duly made to this Court for extensions of time.

During the stated intervening period, the petitioner in this cause did attempt to invoke the jurisdiction of the Florida Supreme Court; however, that Court did not have jurisdiction to review this case. The jurisdictional power of the Florida Supreme Court is defined in Article V, Section 4(2) of the Constitution of the State of Florida. The decision sought to be reviewed (R 438) patently on its face does not come within any of the categories in which the Florida Supreme Court might conceivably have jurisdiction. The petitioner sought a writ of certiorari in the Florida Supreme Court (R 440-450) upon the "direct conflict" theory that the decision sought to be reviewed clashed with prior precedent. The Florida Supreme Court, in denying the writ, established that the allegation of direct conflict was unfounded. Even a casual reading of the jurisdictional provision of the Florida Constitution pertaining to the Florida Supreme Court reveals that a direct conflict must actually exist between the decision sought to be reviewed and a prior decision of either the Supreme Court or sister

district court. In this case the decision of the District Court of Appeal recites on its face a prior decision of the Florida Supreme Court and two prior decisions of the same District Court as authority for the decision. Clearly the decision is not in conflict as required by the Florida Constitution to vest jurisdiction in the Florida Supreme Court. Actually the petition for certiorari filed in the United States Supreme Court eliminates even the vaguest possibility that the petitioner sought to invoke the jurisdiction of the Florida Supreme Court in a good faith attempt to exhaust state remedies. On page 11 of the petition for certiorari it is stated that "the present case marks the addition of the State of Florida to those jurisdictions that steadfastly and consistently refuse to adhere to the constitutional principles enunciated by this Court." That statement must mean that the petitioner considered this case novel to the jurisprudence of the State of Florida. That being the case, it is impossible for the petitioner to have labored under the belief that the Florida Supreme Court had jurisdiction based on a "direct conflict", as a matter of law with any prior decision of a sister district court or the Florida Supreme Court.

The Florida Supreme Court in *Lake* v. *Lake*, 103 So. 2d 639 (1958 Fla.) shortly after the District Courts of Appeal were created on July 1, 1957, put the bar, the bench and the public in the State of Florida on absolute notice that the District Courts of Appeal were courts of final appellate jurisdiction. After outlining the background that led to the constitutional establishment of the District Courts of Appeal, the Florida Supreme Court held as follows (103 So. 2d at 641-642):

> "To meet these objections, which were plainly well-founded, it was the judgment of those who struggled with the problem that the formation of district courts of appeal could be conscientiously recommended

to the people if the *powers* and *jurisdiction* of the Supreme Court were so defined and confined that there would be no danger of the district courts of appeal becoming way stations on the road to the Supreme Court.

They are and were meant to be courts of final, appellate jurisdiction."

(Emphasis is the Court's)

In the recent decision of *Nash* v. *Florida Industrial Commission*, ... U.S. ....., 88 S. Ct. 362, this Court recognized the limited jurisdiction of the Florida Supreme Court and recognized the District Court of Appeal as the highest court in Florida wherein a decision could be had as required by 28 U.S.C., Section 1257(3).

It is undeniable in this case that the decision of the District Court of Appeal, Third District of Florida, sought to be reviewed by the petition for certiorari filed in this cause was rendered by the highest court in Florida in which a decision could be had. That decision became final on June 13, 1967. The petition for certiorari filed in this Court 204 days thereafter is untimely and out of season and for that reason this Court does not have jurisdiction of this case.

CONCLUSION

Based on the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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MARION E. SIBLEY

.....

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was furnished to the following:

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by mail, by depositing the same in a United States mail box, with first class postage prepaid affixed, except in the case of Mr. Eugene Gressman, who, being a distance of more than 500 miles away, airmail postage prepaid was affixed, appropriately addressed, to counsel for the respective parties as specified in A)-E) above, on this the ..... day of February, 1968.

.....

IRVING B. LEVENSON

APPENDIX

1. Article V, Section 4, entitled "Supreme Court", Subsection (2), entitled "Jurisdiction", Constitution of the State of Florida:

> "Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of contitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

2. Florida Appellate Rule 1.3 defining the term "rendition":

> "Rendition" of a judgment, decision, order or decree means that it has been reduced to writing, signed and made a matter of record, or if recording is not required then filed. A paper is deemed to be recorded when filed with the clerk and assigned a book and page number. Where there has been filed in the lower court a timely and proper motion or petition for a new trial, for a rehearing, or other timely post-trial motion or petition permitted by the Rules, the decision, judgment, order or decree shall not be deemed rendered until such motion or petition is disposed of."

3. § 48.08, Florida Statutes, 1961, entitled "Notice of suit, form":

"Upon filing the sworn statement, and otherwise complying with the foregoing requirements, the plaintiff shall be entitled to have issued by the clerk or judge, not later than sixty days after the filing of the sworn statement, a notice of suit which notice shall set forth:

(1) The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim by, through, under or against a known party which may be described as 'all parties claiming interests by, through, under or against (name of known party)' and a description of all other unknown defendants which may be described as 'all parties having or claiming to have any right, title or interest in the property herein described';

(2) The nature of the suit or proceeding in short and simple terms (but neglect to do so shall not be construed as jurisdictional);

(3) The name of the court in which the suit or proceedings were instituted and an abbreviated title of the case;

(4) The description of real property, if any, proceeding against."

4. § 48.09, Florida Statutes, 1961, entitled "Notice of suit, return day."

"The notice of suit shall require the defendant to file his answer with the clerk of the court and to serve a copy thereof upon the plaintiff or plaintiff's attorney, whose name and address shall appear in, or be annexed to, said notice not later than the date fixed in said notice, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice."

5. § 48.10, Florida Statutes, 1961, entitled "Notice of suit, publication, proof and recording thereof."

"(1) All such notices of suit shall be published once during each week for four consecutive weeks (four publications being sufficient) in some newspaper published in the county where the court is located, said newspaper to meet such requirements as may be prescribed by law for such purpose.

(2) Proof of such publication shall be made by affidavit of either the owner, publisher, proprietor, editor, business manager, foreman or other officer or employee of such newspaper having knowledge of such publication, which affidavit shall set forth or have attached a copy of said notice, shall set forth the dates of each publication and otherwise comply with the requirements of law, and shall be recorded in the chancery order book or minute book of the court wherein the suit or proceeding is pending, unless a certificate thereof be made as provided in § 48.12."

6. § 48.13, Florida Statutes, 1961, entitled "Notice of suit, mailing of."

"If the residence of any defendant or other party to be served by publication shall be stated in the sworn statement with more particularity than the name of the state or country in which the defendant resides, the clerk, or the judge if there be no clerk of such court, shall mail a copy of such notice by United States mail, with postage prepaid, to each such defendant within ten days after the making of the notice, the date of mailing to be noted on the docket. A copy of the complaint shall be mailed to nonresident defendants."

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No. 986

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON, *Respondent.*

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The two sentence opinion of the court below states a view of the judicial power of a court of general jurisdiction. Petitioner has asserted that this view is in violation of the United States Constitution, under prior decisions of this Court, and that since many other states have followed this same erroneous view of judicial power, this case should be reviewed by this Court.

In her lengthy Brief in Opposition, respondent has attacked the jurisdiction of this Court to consider this case based upon two grounds: (a) that the petition was untimely filed because petitioner sought review by certiorari in the Supreme Court of Florida (Respondent's Brief, pp. 53-56); and (b) that petitioner allegedly lacks standing under state law to assert the constitutional issue herein, which, it is contended, constitutes an "adequate state ground" to support the decision of the District Court of Appeal below. (Respondent's Brief, pp. 43-53). Petitioner submits that both of these arguments are wholly without merit under applicable state law and procedure, and the practice and procedure of this Court.

A. The Timeliness of the Petition

We deal first with respondent's contention regarding the timeliness of the Petition herein, which is based upon the jurisdictional relationship of the Supreme Court of Florida with the Florida District Courts of Appeal, under Florida law.

The respondent's challenge, simply stated, is that petitioner, by exhausting all possibilities of state court review and filing a timely petition for certiorari to the Supreme Court of Florida from the decision of the District Court of Appeal, thereby lost its right to seek review of that decision in this Court. The Petition herein is said to have been filed more than 90 days after the final judgment below.

Petitioner sought review in the Supreme Court of Florida under Article 5, Section 4 of the Constitution of Florida, which provides:

> "The supreme court may review by certiorari any decision of a district court of appeal * * * that is in direct conflict with a decision of another dis-

trict court of appeal or of the supreme court on the same point of law * * *."

The Supreme Court of Florida has stated in answer to questions of Florida appellate procedure certified to it by this Court in *Dresner* v. *City of Tallahassee,* 164 So. 2d 208 (Fla. 1964) that:

> "We contribute an additional observation regarding a possible review of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the instant case. Under Florida constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. * * * *To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked."* 164 So. 2d at 212 (Emphasis added).

Petitioner asserted several instances of "direct conflict" with the District Court's "decision" on "points of law" within the meaning of those terms as construed by the Florida courts[1] in its petition to the Supreme Court of Florida, which petition is part of the record herein at pp. 440-450. Petitioner believed in good faith that a "direct conflict" within the meaning of the Florida Constitution existed between the decision of the District Court below and prior Florida decisions

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[1] See, e.g., *McBurnett* v. *Playground Equipment Corp.*, 137 So. 2d 563, 565 (Fla. 1962); *State* v. *Moore's Estate,* 153 So. 2d 819 (Fla. 1963); *Young Spring and Wire Corp.* v. *Smith,* 176 So. 2d 903 (Fla. 1965); *Seaboard Airline R. Co.* v. *Branham,* 104 So. 2d 356 (Fla. 1958).

on several "points of law," but in all events, until the Florida Supreme Court had acted, the existence of such "direct conflict" was surely arguable. Under these circumstances, petitioner was required to seek such review under the jurisdictional statute and decisions of this Court requiring a decision from "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257; *Stratton* v. *Stratton,* 239 U.S. 55 (1915).

The Supreme Court of Florida having denied certiorari, under the decisions of this Court the decision of the District Court of Appeal became the reviewable decision, *Sullivan* v. *Texas,* 207 U.S. 416 (1908). As stated in *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 21 (1923):

> "Of course the limit of time for applying to the Court was from the date when the writ of certiorari was refused."

The Supreme Court of Florida denied the writ of certiorari on October 11, 1967, and the petition for certiorari was filed herein on January 3, 1968, well within the 90 day limitation period.[2]

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[2] Several of the recent cases in which jurisdiction has been assumed by this Court which have arisen from the Florida Courts have identical procedural histories with the case at bar. For example, in *Simons* v. *Miami Beach First National Bank,* 381 U.S. 81 (1965), the District Court of Appeal denied rehearing on November 22, 1963, 157 So. 2d 199; a petition for certiorari was taken to the Supreme Court of Florida, which denied certiorari in May, 1964, 166 So. 2d 151; and the petition for certiorari, which was granted by this Court, was filed on August 10, 1964, 33 U.S. Law Week 3065, within 90 days of the denial of certiorari by the Florida Supreme Court, but almost nine months after the District Court of Appeal decision. *Brooks* v. *Florida,* 389 U.S. 413 (1967), had an identical procedural background.

It should be noted that the decision of the District Court of Appeal in this case was an affirmance in an *appeal* from a trial court, and not a denial of *certiorari* without opinion, as in *Callendar* v. *State,* 181 So. 2d 529 (Fla. S.Ct. 1966), and *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 237 (1967), where this Court stated in footnote 1:

> "The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Court of Appeal."

Thus, petitioner properly exhausted all possibilities of state court review and its Petition to this court was timely filed.

B. Petitioner's Standing To Raise Constitutional Issue

We deal next with respondent's argument regarding petitioner's alleged lack of standing under state law to raise the question here presented. Such lack of standing, it is said, constitutes an "adequate state ground" upon which the lower courts might have based their decisions and, as a result, respondent contends that the constitutional issue is "Not Necessary and Unavoidable." (Respondent's Brief, p. 43).

Examination of the opinions of the Dade Circuit Court below (Appendix C to Petition for Certiorari, pp. App. 4-App. 13, particularly at pp. App. 8-App. 10), together with the opinion of the District Court of Appeal, (Appendix B to Petition for Certiorari, pp. App. 2-App. 3) reveal that the State courts squarely entertained and decided the federal question before them and did *not* decide this case on any independent state ground, although respondent argued petitioner's al-

leged lack of standing under state law at similar length in the courts below.

The reason for the state courts' rejection of the lack of standing argument was simply that the argument had no substance under state law.

Petitioner Wheatland Hills Corp.'s title to the property upon which levy is sought in the present case was obtained almost a year prior to the rendition of the alimony judgment against Richard Morton in Sarasota (R. 195). The enforcement of the Sarasota judgment obtained against Wheatland Hills Corp.'s grantor, Richard Morton, by levy upon its property, obviously and substantially affected *its* rights which had been obtained long prior to the rendition of the Sarasota judgment. If the Sarasota judgment is a void judgment for lack of jurisdiction, as petitioner has consistently asserted, petitioner has every right under Florida law to collaterally attack the judgment:

> "A grantee of land from one having outstanding against her a void judgment may maintain a bill in equity to cancel a void judgment as a cloud upon its title to the land." *Protective Holding Corporation* v. *Cornwall Co.*, 127 Fla. 252, 173 So. 804 (1936).

See also, *Napoleon B. Broward Drainage Dist.* v. *Certain Lands,* etc., 160 Fla. 120, 33 So. 2d 716, 718 (1948); *Hennig* v. *Hennig,* 162 So. 2d 288 (3rd Dist. Fla. 1964).[3]

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[3] Although respondent states in her brief at page 46 that "Richard Morton could not make that attack [collateral attack on the Sarasota final decree] since he had actual notice and declined the opportunity to defend that was afforded to him. . . .", this is clearly not the law of Florida. "The defect in the divorce proceeding, as far as concerns divesting the husband's interest in the real property, was jurisdictional subject to collateral attack." *Hennig* v. *Hennig,* 162 So. 2d at 289.

This state law is in accordance with the Restatement of Judgments, which provides:

> "Where the proceeding in which the judgment is rendered is a proceeding in rem or quasi in rem (see §§ 32-40), and the judgment is void, it is open to a collateral attack. Such a judgment has no effect on property interests which are the subject matter of the proceeding * * * " Section 11, Comment g, p. 69.

Even the case relied upon by respondent as establishing some "quasi-estoppel" against petitioner, *Gaylord* v. *Gaylord,* 45 So. 2d 507 (Fla. S.Ct. 1950) (quoted at pp. 46-47 of Respondent's Brief), is simply inapposite, for as the court there stated:

> " * * * [N]ot 'all strangers are entitled to impeach a judgment. * * * They are by law allowed to impeach it whenever it is attempted to be enforced against them *so as to effect rights or interests acquired prior to its rendition.*' " (Emphasis in original). 45 So. 2d at 509.

A further answer to respondent's "adequate state ground" argument is that it is simply inapplicable to this case under any view of the record or Florida state law. This is because, as stated by this Court in *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95 at 98 (1938):

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment, if, as here, it is a final judgment."

See also, *Grayson* v. *Harris,* 267 U.S. 352, 358 (1925); *Virginia* v. *Imperial Cool Sales Co.,* 293 U.S. 15, 16-

17 (1934); *International Steel and Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936); *Steele* v. *Louisville and N.R. Co.*, 323 U.S. 192, 197, n. 1 (1944).[4]

If, as this Court held in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), and *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917), a " * * * seizure at the commencement of proceedings" is required as an "essential" of due process of law in order to vest a court with jurisdiction, mere knowledge of the Sarasota proceeding did not require Wheatland Hills Corp. any more than Richard Morton to enter into a proceeding in which it, as well as he, had not been personally served with process. Nor had its property been seized or brought into *custodia legis* prior to the rendition of the Sarasota alimony decree.

CONCLUSION

In respondent's Brief, the constitutional issue does come to the surface once. Petitioner submits that this Court should grant certiorari to consider whether, in respondent's own words, "A notice of suit duly issued specifically describing the non-resident husband's property within the state as property being proceeded against and sought to be subjected to the lien of the decree to be rendered in favor of the wife and children constitutes a seizure and makes the proceeding one in rem against such duly described property" (Respondent's Brief, p. 41). To that formulation of the

[4] "But if the state court in terms bases its decision upon a determination of the federal question, the argument will not be heard in an attempt to defeat the jurisdiction of the Supreme Court, that the state court might have based its decision, consistently with the state of the record, upon an independent and adequate ground." Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 91, p. 169 (Wolfson and Kurland ed., 1951).

constitutional issue petitioner would add only: "where the wife claims no preexisting interest in the property."

Thus, the issue is nothing more complicated than whether a "notice" constitutes a "seizure". Petitioner submits that this Court has held in *Pennoyer* and *Pennington* that a constructive notice is not a seizure of property, and that certiorari is clearly essential where the state courts generally (See Petition pp. 16-17) and steadfastly refuse to adhere to these principles in the context of divorce and alimony as the decision of the court below exemplifies.

For these reasons, supplementing those in the Petition, certiorari should issue to review the judgment below.

Respectfully submitted,

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